The Central Law Journal.

SAINT LOUIS, JULY 13, 1877.

CURRENT TOPICS.

We are unable this week to print our usual Abstracts of Recent Decisions of the different State Courts on account of our nonpareil type being required for the index to the last volume of the JOURNAL. In the place of these we give a number of Abstracts of late Decisions of the Supreme Court of the United States; Notes of Recent English Decisions, and abstracts of cases published in full in the different law journals of this country. We hope to have the index ready for our subscribers next week.

IN A recent case in England, Ludbrook v. Barrett, 25 W. R. 649, where, under a building contract, it was a condition precedent to payment that the builder should execute the works to the satisfaction of the architect, it was held, on demurrer, that an action could be maintained against the architect for fraudulently and collusively refusing to certify that he was satisfied with the work. The court, in its opinion, cites no authorities, and states that no such action had previously been before the courts. The action for maliciously inducing another to break a contract would, however, seem to be a parallel case. Lumley v. Gye, 2 E. & B. 216.

THE BAR ASSOCIATION of St. Louis is likely to have another opportunity of illustrating before public opinion the purposes of its organization. The investigation into the affairs of an alleged insolvent insurance company which has been going on for some time before a referee, has placed another member of the St. Louis Bar in a most questionable position. The member in question is, at the time of our going to press, preparing a statement which he claims will exonerate him from any imputation of professional impropriety. Not wishing to assist in forestalling the professional judgment against a man who may be innocent, we prefer to withhold the comments on the case which we had intended to make, until we shall have seen what the member in question may have to offer in explanation or rebuttal of the *prima facie* case which, in our judgment, has been made out against him.

ALTHOUGH by the common law of England long and uninterrupted use of light and air passing over the adjoining land of another, will give an easement to the tenant so using it, and property in such an easement so acquired will be as complete as if it had been by grant or deed, (Washburn on Easements, 3d ed. 608; Tyler on Boundaries, 521; 2 Wm. Saunder's R. 175), a different rule has been adopted in most of the states, and the tendency of the courts generally is to discard the common-law rule as inapplicable to this country and the habits of the people. In a recent case in Georgia, Turner v. Thompson, decided at the last term of the supreme court of that state, the common law doctrine was held not to be the law in Georgia. In New York and Massachusetts, the earlier decisions are in accord with the common law upon the subject, but the later adjudications are directly opposed to it. In fact New Jersey, Louisiana and Illinois would seem to be the only states that continue to adhere to the English rule. The subject is discussed at length, and with great ability, by the Supreme Court of Indiana, in Stein v. Hauck, 4 Cent. L. J. 581.

IN THE last number of the Albany Law Journal, Chief Justice Neilson gives his sixth article on the character of Rufus Choate—a subject which, though fascinating at first, is beginning to get a little tedious. Appended to this article is a letter written to Judge Neilson by Mr. James T. Field, from which we conclude that Mr. Choate was indeed a great man, and now that he has passed

"Beyond the arrows, shouts and views of men,"

"his supreme qualities are only beginning to be appreciated in their grander aspects." "To follow him, to wait upon his footsteps through the courts of law, the senate or the lecture room, was in a certain sense to be

'From unsuspecting ignorance preserved.'"

When he went out to walk, the boys followed him and watched him as they did the man that went up in the balloon, and "as he came sailing into view,

'On broad, imperial wing,'

with that superb and natural gait so easily recognized by those who knew him,

'Far off his coming shone.'"

"Happy the youth who was occasionally privileged to walk with him on such occasions,

'Under the opening eyelids of the morn.'"

"Well might a young man, thus enchanted, exclaim with Comus:

'Oh, such a sacred and home-felt delight,
Such sober certainty of waking bliss
I never heard till now!'"

"As Churchill said of Garrick, he also had indeed—

'Strange powers that lie
Within the magic circle of his eye.'"

From which we infer that it was not all in Mr. Field's eye.

CONSIDERABLE comment is being made by the English law journals upon a recent ruling of Mr. Justice Field of the Supreme Court of Judicature, at *nisi prius*, that it was contrary to the rules of masonry to come into a court of law for the settlement of such a question as that before him. The parties to the action were masons, and the

action was brought upon a letter alleged to be libelous, and written in reference to an election of members to their lodge. The judge suggested that the matter should be referred to the grand master, and although it was stated by counsel for the defendant that the grand master had said that it was a case for a court of law, the order of the court was: "Let it stand over to go before the grand master." The Solicitor's Journal calls the attention of the court to the old principle of law, that parties can not by contract oust the courts of their jurisdiction. Another journal suggests that the judges should remember that they are lawyers first and masons afterwards, and hopes that the time may not be at hand when judges will be seen tipping the masonic wink to counsel, and jurymen giving the countersign to parties. "What weight," says a third newspaper, "the judge's words will have on the grand master will, we suppose, depend on his masonic rather than his judicial rank, but the position of the plaintiff in the action is not enviable. Like a dutiful mason, he had applied to his grand master to settle the matter, and was referred to a court of law. He instructs his counsel, pays his fees, and is happy to see his case set down before a brother mason. All his pains, however, he finds thrown away, as the judge sends him back again to the grand master, who has already expressed himself unable to try the case. Upon the question of masonic law we do not venture to question the decision of the judge; but in the less occult science of English law there is a maxim which but for the repression of the lawyer in the mason, he would not have forgotten. It has hitherto always been recognized that agreements to oust the jurisdiction of the ordinary law courts are void. If the masons can settle among themselves such disputes as that in question without going to law, so much the better; but when their officials express their incompetence, and the parties have been put to all the expense of preparing for trial, it is a little late for the judge to restrict his jurisdiction."

IN RE Worthington, 9 C. L. N. 346, the decision of the United States District Judge for the Western District of Wisconsin, in the same case, reported 3 Cent. L. J. 526, holding that a judgment docketed on Christmas day, a legal holiday within the State of Wisconsin, was a nullity, is reversed by Judge Drummond. The district judge based his decision on the ground that the docketing of a judgment was a judicial act; the circuit judge decides that it is a mere ministerial act. "It may be admitted," says Judge Drummond, "that the entry of a judgment by which a man's property is to be bound, or, as it is termed in the statute of this state, the docketing of the same, is a very important act. The entry of the judgment is judicial, but is the docketing of the judgment by the clerk any more than a ministerial act? There is no exercise of discretion or of judgment, but the language of the statute to him is mandatory. He *shall* do certain things, and they are particularly described, and in relation to them he can have no discretion; and it would seem that they were mere ministerial acts. And while this is true of the act of the clerk who dockets the judgment in the court where it is rendered, it would seem that where it is transferred to another county and docketed there, that there could be, if possible, less doubt of the character of the act to be performed by the clerk of that county; because all that the statute requires is that a transcript of the original docket shall be filed with the clerk of the circuit court of the county, so that all that is necessary for the clerk to do is simply to receive the transcript which is brought to him, and file it, and mark it with the date when it is filed. This certainly can be considered nothing more than a ministerial act, not void at common law, and, as I think, not rendered so by any statute of this state." There has been considerable conflict of authority as to what are judicial and what are ministerial acts. In Van Vechten v. Paddock, 12 Johns. 177, it was held that the issuing of process on Sunday was a judicial act, and therefore void. But in Johnson v. Day, 17 Pick. 106, it was declared that an arrest on civil process on Sunday was legal at common law, and that is the opinion of the judge who decided the case of Pearce v. Atwood, 13 Mass. 324. For a thorough discussion of this question, see Reid v. State, 4 Cent. L. J. 154, and the note thereto.

THE St. Louis Court of Appeals have recently delivered an opinion in the case of Dooley v. Barker, construing the statute of this state (Wagner, 1041, § 18), which authorizes the courts to direct a compulsory reference where the trial of the cause requires the examination of a long account. The suit in this case was brought by an attorney for professional services, and the account consisted of eight items of charges and one credit of money paid. Against the objections of the defendant the cause was referred to a referee who reported a balance of eighty-five dollars due the plaintiff, which report was confirmed and judgment entered for that amount. The court of appeals reversed the judgment on the ground that the account in question was not a "long account" within the meaning of the statute. An account they define to be "a detailed statement of mutual demands in the matter of debit and credit between parties arising out of contract or some fiduciary relation," a definition accepted by the supreme court in McWilliams v. Allen, 45 Mo. 574. "In New York," say the court, "under a like statutory provision, this question has come up again and again; and there can be no doubt that an account such as this, consisting of eight items, which really seem to be only three items at most, split up into unnecessary subdivisions, with one entry of a credit for money paid on account, would be held in New York not a proper subject for a reference in the absence of consent. 16 Abb. Pr. Rep. 257. Dickenson v. Mitchell, 19 Abb. Pr. Rep. 286, was a case of attorney against client; the bill of par-

ticulars had five distinct charges on the debit side and one item on the credit side. The supreme court at general term held this not an account in the legal sense of the term, and that if it were an account it was not a long account, and that it was an error to order a compulsory reference."

When a case is referable under the statute, whether it should be referred or not is usually a matter within the discretion of the trial court. But the court of appeals in the case under consideration has somewhat restricted this rule. "We are told," the court say, "that this is a matter purely within the discretion of the court below; and refered to Fitzgerald v. Hayward, 50 Mo. 517. The point decided there is that the court is not, in any case, bound to refer, which is quite different from saying that it can refer whenever it chooses. If the learned judge who delivered the opinion of the court says, as he does, 'it is quite plain to my mind that the whole subject of reference is a matter of discretion,' he must be understood or speaking with a view to the point before him. It is certain that it is not in the discretion of the circuit court to refer a case against the objection of one of the parties which does not come within one of the three classes named in the law; and the supreme court has expressly decided in Martin v. Hall, 26 Mo., that, where the trial of an issue of fact does not require the examination of a long account, it is improper to refer it against the remonstrance of one of the parties. But the statute itself is so plain that there is no room for construction. Neither is it in the discretion of the circuit court to declare that to be a long account which is manifestly a very short one. '*Discretio est discernere per legem quid sit justum.*' It is not purely arbitrary, and, surely, in matter of discretion, precedents are to be followed, as Coke says. 2 Inst. 298. The courts will not allow mere caprice to be dignified with the title of an exercise of judicial discretion. It is undoubtedly difficult to prescribe a rule which will cover all cases contemplated by the act, and to say what is a long account; but is impossible to say of the alleged account before us that it is a short one. In Martin v. Hall, 26 Mo., already referred to, the supreme court refused to reverse the judgment though it said that there was no necessity for referring the case, as it was susceptible of jury trial without too great inconvenience, and considered it doubtful whether the account was a long one. But that required measurements, calculations and the computation of mutual debits and credits; and under all the circumstances and the judgment having been for the right party, the court refused to reverse on account of the order of reference." We would however call attention to a recent case in the Court of Appeals of New York, Martin v. Windsor Hotel Co., 15 Alb. L. J. 495, where, in an action by an attorney for services, the general term of the supreme court had decided that the case ought not to be referred to a lawyer, and the court held that the order was not appealable. 232

THE POLICY OF THE LAW IN CASE OF DISPUTED CLAIMS TO AN OFFICE.

Chief Justice Marshall says: "An office is a public charge or employment, and he who performs the duties of that office is an officer." An office is an entirety, and for this reason, as well as upon grounds of public policy, the law will not recognize the anomaly of two persons in possession of an office at the same time. 10 Paige, 223. Hence has arisen the distinction between an officer *de jure* and an officer *de facto*. The one has the lawful title, with or without possession, the other has possession under color of right, but without regard to right, each being distinguished from the mere usurper, who has neither lawful title nor color of right. The color of right necessary to constitute one a *de facto* officer may consist in the form of an election or appointment, or in holding over after one's term of office has expired, or in the continuous exercise of official functions, with the acquiescence of the public, for so long a time as to raise a presumption of colorable right. The law discountenances usurpation and makes the acts of the mere usurper utterly void. The acts of an officer *de jure*, within the scope of his authority, are entirely valid. The acts of an officer *de facto*, so far as they affect the public and third persons, are held to be as valid and effectual as if he were an officer *de jure*. This rule is founded in the imperative necessity for security in public and private affairs. Its policy is to prevent confusion and failure of justice.

But it does not shield the officer *de facto*, if he holds the office without right. He will not be allowed to take advantage of his own wrong. He must act at his peril, where an officer *de jure* may plead the official character of the act complained of as a justification. Every officer is bound to know his right to the office, but the public are not. To require each individual to examine and determine for himself the title to an office, or act at his peril, would be unreasonable; and this constitutes one reason for the rule above-stated. It is also against public policy to allow the title to an office to be settled in a suit between individuals. A judgment in such suit would bind only the parties to it, leaving the public still free to adopt or reject it, as private interest or political prejudice might prompt. The policy of the law is to avoid a multiplicity of suits.

Quo warranto, being a proceeding by the state, or people, binds everybody. For this reason, among others, it is usually made the exclusive mode of testing the title to an office. Another reason is, that the rights of the public, as well as the respective claimants, are deeply involved in the settlement of title to an office; and in *quo warranto*, both the state and the opposing claimants are represented. Besides, in *quo warranto*, an exception is made to the general rule, that a given discretion can not be reviewed; and because it is a proceeding by the state, involving the rights, not only of the respective claimants, but of the public generally, all acts of inferior boards and offi-

cers of election are allowed to be reviewed. People v. Doane, 7 Cal. 432. In 17 Ia. 525, the court say: "It is clear, therefore, upon principle, as well as upon authority, that the right or title to an office can not be determined by a civil action between the respective claimants." It is equally well settled, that one in possession of an office, when adverse claim is made to it, may continue to discharge its duties until the question of title is settled.

Until an officer *de facto* is ousted by *quo warranto*, it is said by an eminent law writer that "he holds the office by sufferance of the state, and the silence of the government is construed by the courts as a ratification of his acts, which is equivalent to a precedent authority. When the government acquiesce in the acts of such officer, third persons should not be allowed to question them." Blackwell on Tax Titles, 117. In 19 Ind. 356, Perkins, J., speaking of one chosen to an office, says: "But if when such person attempts to take possession of the office he is resisted by the previous incumbent, he will be compelled to try the right in some mode prescribed by law. If such elected or appointed person finds the office in fact vacant, and can take possession uncontested by the former incumbent, he may do so, * * * but should such former incumbent appear after possession has been taken against him, the burden of the proceeding to oust the *then* actual incumbent would rest on him." This was also held in Conover's case, 5 Abb. Pr. (N. Y.) 171, on the ground, as stated by the court, that "the public interests—the interest of all persons having business with the office in controversy — imperatively requires that until the question of title can be settled, there should be some *one* person recognized as in peaceable possession *de facto* of the office." See also 9 Paige, 507. Again, in Leach v. Cassidy, 23 Ind. 449, the court say: "The law has provided abundant means by which an officer *de jure* may become such *de facto* against another who wrongfully holds possession, but the public are interested that, while such litigation is pending to settle the right, the functions of the office shall continue to be exercised, in order that public business may be done. To this end it is a rule of plain common sense, as well as law, that the officer *de facto* shall act until he shall be ousted."

Consonant with this policy, in summary statutory proceedings to compel an officer to deliver books and papers of the office to his successor, courts have held, 1st, that they will inquire if plaintiff's title is free from doubt, and if it is not will deny him this remedy for books and papers, and require him to try the right by *quo warranto;* and, 2d, that a party not in possession of an office shall not thus recover its books and papers from one in possession and discharging its duties, unless, from the nature of the office, or the position of the applicant, he can immediately, upon the recovery of such books and papers, perform the duties of the office; because, otherwise, the exercise of important functions of the office might be suspended. He must first oust the incumbent, and put himself in a position to perform the duties of the office. 5 Abb. Pr. (N. Y.) 281—Develin's case.

Nor will courts by *mandamus* compel delivery of books and papers when there is any doubt as to the title to the office, but will send the relator to his *quo warranto* to try the right. In People *ex rel.* Brewster and Jones v. Kilduff, 15 Ills. 492, the court by *mandamus* compelled an ex-mayor to deliver the seal of office to the mayor elect; but in the opinion, rendered by the Supreme Court of Illinois, state as follows: "A *quo warranto* is the proper writ to try the question of title to the office. But this writ (mandamus) is not asked for this purpose. It is asked to deliver to the mayor elect and qualified, the seal, the insigna of office. And to defeat the application and prevent the issuing of the writ for that purpose, this *groundless, colorless claim* is set up to the office itself, and the party's *pretended* intrusion into, or retention of it, is sought to create *such a doubt of the true title*, or *controversy about it*, as to justify the withholding of the writ and sending of the informant to his *quo warranto*;" thus admitting that in case of "doubt of the true title," *mandamus* would be withheld and the relator sent to *quo warranto* to try the right. The decision of the same court in case of People *ex rel.* Cummings v. Head, 25 Ills. 325, granting mandamus for delivery of books and papers to a clerk elect, is evidently upon the same principle, although sometimes cited as authorizing delivery of books and papers to *any* holder of the *prima facie* title to an office, regardless of doubts as to the true title. The facts are not fully stated in the opinion rendered, but after quoting from the opinion in 15 Ill. 492, the exact language herein above-quoted, the court say: "These reflections are as pertinent to this case as any well could be, and hence we quote them." Hence, we must infer there was no "doubt of the true title," or "controversy about the title," in this case, to justify the withholding of the writ and sending the relator to his *quo warranto*. So, doubtless, upon the same principle, a judge, upon motion merely, might order an officer of his court to deliver books and papers to a successor, where it appears upon the hearing that he has but a "groundless and colorless claim" to the office, as in the cases last-above cited. But this the judicial mind only should be allowed to determine.

The policy of the law also requires that, pending the trial of right to an office, the *de facto* officer should be recognized by other officers of the government. For the same necessity which requires that he be allowed to discharge the duties of the office pending the controversy, and that his acts be held valid as to the public and third persons, demands also his recognition by other officers. Pending a contest for the office of school trustee, the court, by *mandamus*, compelled a county auditor to draw his warrant in favor of the *de facto* school trustee for school funds, and the

Supreme Court of Indiana, in affirming that judgment, say: "It would be a strange state of the law which would close the doors of the schools and turn the children into the streets for a year or two, to await the settlement of the conflicting claims of Cassidy and Leach to the office of trustee. So when it was made to appear to the court that Cassidy *was in possession of the office*, it very properly compelled the auditor to recognize him." 23 Ind. 450. So where it was the duty of a board of supervisors to approve the sheriff's official bond, their refusal to act upon a new bond presented by a sheriff leaves them in default, not him. Doane v. Scannell, 7 Cal. 393.

The rule making the acts of an officer *de facto* valid as to the public and third persons, applies as well to his execution of an official bond as to any other official acts; and neither he nor his sureties could avoid liability because he was only a *de facto* officer. Neither will the non-approval of his bond release them from liability if it is delivered. In Taylor v. The Auditor, 2 Ark. 189, the court say: "The failure of the officer and securities to obtain an approval of his official bond, as required by statute, does not in any manner affect the liability of the officer and his securities in such bond, if it is in everything else legally executed, and by them delivered as their obligation." See 2 Pike, 73.

There are a few decisions of courts, reported without full statement of facts, which *seem* to be in conflict with some of the principles underlying those herein cited, but if any are plainly so they are clearly overborne by the weight of authority and reason. L. C. S.

NEGOTIABLE INSTRUMENTS.

SAMSTAG v. CONLY *ET AL.*

Supreme Court of Missouri, April Term, 1877.

HON. T. A. SHERWOOD, Chief Justice.
" W. B. NAPTON,
" E. H. NORTON,
" WARWICK HOUGH,
" JOHN W. HENRY, } Judges.

Defendants, the maker and payee of an instrument in which the maker waived "any and all exceptions under and by virtue of any execution, exemption, homestead or stay laws of the State of Missouri, or that of any other state," and in which he promised also "to pay a reasonable attorney's fee for the bringing of suit in collection of this note, if suit thereon be brought or collection thereof be enforced after the same shall become due," were sued as maker and endorser, respectively. *Held*, (1), affirming Bank v. Gay, 63 Mo. 33, 3 Cent. L. J. 465, that it was not a negotiable promissory note; (2) that the defendants were not jointly liable; (3) that the assignor could only be held liable in an action against him upon his implied undertaking to pay after due diligence used by the assignee in the institution and prosecution of suit against the maker for the recovery of the money due, or in the event of insolvency or non-residence of the maker, so that suit would be unavailing or could not be instituted.

APPEAL from the Circuit Court of Newton County.

N. H. Dale, for appellants; *Geo. Hubbard*, for respondents.

HOUGH, J., delivered the opinion of the court:

The petition in this case contained two counts, and seeks to charge the defendant, Conly, as maker, and the defendant, Dale, as indorser of two obligations in writing, alleged to be negotiable promissory notes. The instrument declared on in the first count is as follows:

$100. NEOSHO, Mo. Aug. 29, 1874.

One month after date I promise to pay to the order of N. H. Dale, one hundred dollars for value received, negotiable and payable without defalcation or discount, with ten per cent. interest thereon from maturity till paid, and if said interest shall remain unpaid for the time of one year from the maturity of this note, then the same to become as principal and bear the same rate of interest as principal and to be compounded annually; and we do each and severally expressly waive any and all exceptions under and by virtue of any execution, exemption, homestead or stay laws of the State of Missouri, or that of any other state; and do each further promise and agree to pay a reasonable attorney's fee for the bringing of suit in collection of this note, if suit thereon be brought or collection thereof enforced after the same shall become due, payable at the Newton County bank of Samstag and Stein.

(Signed.) H. CONLEY.

Indorsed, N. H. DALE.

The instrument declared on in the second count, is in all respects identical with the foregoing, except as to amount, and is indorsed, N. H. Dale, L. B. Hutchinson.

Plaintiff's recovered judgment against both defendants on both counts, and the defendant Dale has appealed to this court.

The question presented is, whether defendants Conley and Dale can be jointly sued.

As the obligation sued on can not be held to be negotiable instruments, since the decision of this court in the case of the Bank of Trenton v. Gay *et al.*, 63 Mo. 33, 3 Cent. L. J. 465, the defendant Dale can only be held liable in an action against him on his implied undertaking, as assignor, to pay after due diligence used by the assignee in the institution and prosecution of a suit against the maker for the recovery of the money due, or in the event of the insolvency or non-residence of the maker, so that a suit would be unavailing or could not be instituted. W. S., vol. 1, p. 270, § 38; Stone v. Corbett, 20 Mo. 358.

This suit having been brought against Dale as indorser for a negotiable promissory note and not on his implied undertaking as assignor, no recovery can be had against him in the present action, and the judgment will be reversed and the cause remanded.

All the judges concur, except Judge Sherwood, absent.

REMOVAL OF CAUSES.

BEERY v. CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO.

Supreme Court of Missouri, April Term, 1877.

HON. T. A. SHERWOOD, Chief Justice.
" W. B. NAPTON,
" WARWICK HOUGH,
" E. H. NORTON,
" JOHN W. HENRY, } Associate Justices.

The defendant filed its application and bond for the removal of the cause from the State to the Federal court. After approving the bond, the State court permitted the plaintiff to enter a nonsuit: *Held*, that after the filing of the proper application and bond the State court could proceed no further in the cause, and that any attempt in that direction was *coram non judice;* and that, consequently, the nonsuit was improperly granted.

ERROR to the Clinton Circuit Court.

Shanklin, Low & McDougal, for plaintiff in error; *J. F. Harwood*, for defendant in error.

SHERWOOD, C. J., delivered the opinion of the court:

Plaintiff sued defendant for damages in the sum of $1,500, alleged as resulting from the construction and operation of defendant's road on the street in front of plaintiff's premises, in the town of Cameron. Suit was brought in July, 1875. At the ensuing August term defendant applied for the removal of the cause to the Federal court. The application and the bond were in the usual form and the bond approved. After this occurred, plaintiff, as the bill of exceptions recites, "with the avowed purpose of reducing his claim herein below the jurisdiction of a circuit court of the United States, * * * * and for the purpose of preventing said defendant from removing said cause, * * * * and with the intent to renew said suit by filing a new petition in this court, for the said cause of action, with the claim of damages reduced below $500, by leave of the court dismissed said suit." Thereupon the application of defendant was denied.

We regard such denial erroneous. In Stanley v. The C. R. I. & P. R. R. Co., 62 Mo. 508, it was held, following as well a former decision of this court (Harryford v. The Ætna Ins. Co., 42 Mo. 148) as the ruling of the Supreme Court of the United States (Kanouse v. Martin, 15 How. 198; Gordon v. Longest, 16 Pet. 97), that upon the proper application being made conformably to the congressional requisition, the state court should proceed no further with the cause, and any attempt in that direction was *coram non judice*. In that case plaintiff sought to prevent the removal by amendment, whereby he reduced the amount of his claim below $500, but it was held to make no difference, seeing that the jurisdiction of the Federal court had attached. Kanouse v. Martin, *supra*.

I am unable to distinguish the case at bar from our last adjudication respecting applications of the nature under consideration; since, if the jurisdiction of the Federal court had attached to the subject matter of the action, the state court was powerless to proceed in any manner, unless the novel theory of a divided jurisdiction should prevail.

The distinction between taking a non-suit and so amending a petition as to reduce the claim, is one in *degree* rather than in *kind*, because the latter method of procedure is in reality a non-suit *pro tanto*, and the state court, by allowing either course to be taken, is acting in contravention of the legislative mandate. It may be indeed urged that, on reaching the Federal court, the plaintiff may *then* dismiss his suit, and that it is but an idle ceremony to compel him to do this in the United States court instead of the court wherein the cause originated; but this is a matter wherein we have no concern; for it is a question not of convenience or expediency, but a simple one of *power* in the state court to proceed further when expressly prohibited from so doing. The application for removal in the present instance was framed under section 639, R. S. U. S.; but so far as concerns the case before us, and the point being discussed, it was good under the act of March 3d, 1875, as the third section of that act is similar in its provisions to section 639, *supra*, in the duty it imposes on the state court to accept the petition and bond and having done so, to proceed no further in the suit. As before seen, the approval of the court had been given, and consequently no necessity exists for examination of the points elsewhere asserted, that the mere filing of the petition and bond *ipso facto* removes the cause. The Two Orphans, 2 Cent. L. J. 730, and cases cited. For the errors committed in permitting the dismissal and in refusing a removal of the cause, the judgment must be reversed and the cause remanded.

All concur.

SALE OF INTOXICATING LIQUORS — EXEMPLARY DAMAGES.

KOERNER v. OBERLY.

Supreme Court of Indiana, May Term, 1877.

HON. SAMUEL E. PERKINS, Chief Justice.
" HORACE P. BIDDLE,
" WILLIAM E. NIBLACK,
" JAMES L. WORDEN,
" GEORGE V. HOWK, } Associate Justices.

LIQUOR LAW OF 1873—PLEADING.—Under the liquor law of 1873 the plaintiff in a suit can not recover damages for injuries to her person or property unless such injuries are alleged in the complaint.

SAME—EXEMPLARY DAMAGES.—The 12th section of the Act of February 27th, 1873, so far as it authorizes the assessment of exemplary damages in civil suits for acts which the state also provides may be punished by a criminal prosecution, is in violation of the bill of rights, which declares that no person shall be put in jeopardy twice for the same offense, and is therefore unconstitutional and void.

APPEAL from the Marion Superior Court.

WORDEN, J., delivered the opinion of the court:

Jennie Oberly was the wife of Martin Oberly, and this action was brought by her against the appellant to recover damages from the defendant for selling liquor to her husband who, as was alleged, was in the habit of becoming intoxicated, thereby causing his intoxication, whereby the plaintiff was injured in her means of support.

The cause was tried by a jury, resulting in a verdict and judgment for $400.

The defendant at the proper time asked, and the court refused a charge otherwise correct, so far as we can see, embodying the following proposition, viz: "The plaintiff's anxiety of mind, her mortification and sorrow, and the loss of her husband's society you have nothing to do with here, as they can not enter into the measure of damages in this action."

The action was brought upon the 12th section of the act of February 27th, 1873, on the subject of intoxicating liquors (Acts 1873, p. 151). That section gives a wife "who shall be injured in person, or property, or means of support, by any intoxicated person, or in consequence of intoxication, habitual or otherwise, of any person," a right of action against the person furnishing the liquor which, in whole or in part, caused the intoxication. The action will not lie, under the statute, unless the plaintiff was injured in person or property, or means of support, because the statute does not give the right of action for any other injury. The only injury complained of in this case relates to the plaintiff's means of support. There was no allegation of any injury to her person or property. Under the allegations of the complaint it is clear that the plaintiff could not recover damages for "anxiety of mind," "mortification and sorrow," or "loss of her husband's society," because those things were entirely foreign to the case made by the complaint. We need not determine, therefore, whether the matters mentioned in the charge asked could have been considered in estimating the damages, if there had been proper allegations of injury to the plaintiff's person. We are of opinion that the charge asked should have been given.

The defendant also asked and the court refused the following charge: "Compensatory damages are given by

way of compensation for the injury actually sustained. Exemplary damages are such as are added thereto by way of punishment to defendant and warning to others. In this action, if the jury believe from the evidence that the plaintiff is entitled to compensation for the injury complained of, and also that the plaintiff's husband was, at the times the sales were made, in the habit of getting intoxicated, or that the sales were made after nine o'clock on any evening, or on any Sunday, they can not go further then compensate her for the injury actually sustained, and are not authorized to assess against defendant exemplary damages—his punishment in that case being left to the criminal court."

The charge asked was applicable to the case made by the evidence, as well as that stated in the complaint; for it was alleged in both paragraphs of the complaint that the plaintiff's husband was in the habit of getting intoxicated. It was a penal offense under the law to sell intoxicating liquors to a person who was in the habit of getting intoxicated, or to sell it after nine o'clock at night, or on Sundays. (Secs. 6 and 10 of the act above cited.) Hence the question is fairly presented whether, in a civil action under the statute to recover damages resulting from the sale of intoxicating liquors, the sale being made under such circumstances as make it a penal offense, exemplary damages can be allowed. If they can, a man may be punished twice for the same offense: once under the proper form of a criminal prosecution, and again under the form of a civil action; and in the latter action the pecuniary punishment meted out may be much greater than the penalty prescribed for the offense.

The 12th section of the statute above cited authorizes "exemplary damages." In the case of Taber v. Hutson, 5 Ind. 322, it was said by this court: "But there is a class of offenses, the commission of which, in addition to the civil remedy allowed the injured party, subjects the offender to a state prosecution. To this class the case under consideration belongs; and if the principle of the instruction be correct, Taber may twice be punished for the same assault and battery. This would not accord with the spirit of our institutions. The constitution declares that no person shall be twice put in jeopardy for the same offense; and though that provision may not relate to the remedies secured by civil proceedings, still it seems to illustrate a fundamental principle inculcated by every well regulated system of government, viz: that each violation of the law should be certainly followed by one appropriate punishment and no more." See, also, Johnson v. Vuthrick, 7 Ind. 137; Struble v. Nodwift, 11 Ind. 64; Butler v. Mercer, 14 Ind. 479; Nossaman v. Rickert, 18 Ind. 350; Humphries v. Johnson, 20 Ind. 190; Meyer v. Bohlfing, 44 Ind. 238.

We are of opinion that the provision of the statute allowing exemplary damages, as applied to cases like the present, violates the fundamental principle embodied in the bill of rights, that no person shall be put in jeopardy twice for the same offense; and that as applied to such cases it is inoperative and void. The charged asked, in our opinion, ought to have been given. The jury must have allowed large exemplary damages, for it seems to us that $50 or $75 would have covered all the real damages sustained by the plaintiff.

Judgment reversed.

[NOTE.—See on the same point the case of Schafer v. Smith, 4 Cent. L. J. 271.]

THE Supreme Court of Illinois adjourned on the 28th ult. Before doing so they sent for filing in the various divisions over two hundred opinions. These opinions will make nearly two volumes of reports.

SOLEMNIZATION OF ILLEGAL MARRIAGES.

BONKER v. THE PEOPLE.

Supreme Court of Michigan, June Term, 1877.

HON. T. M. COOLEY, Chief Justice.
" J. V. CAMPBELL, } Associate Justices.
" ISAAC MARSTON, }
" B. F. GRAVES, }

1. IMPEDIMENTS TO MARRIAGE—AGE OF CONSENT.—A Michigan statute (2 Comp. L. S. 4729) makes it a misdemeanor to solemnize a marriage without authority to do so, or with knowledge of legal impediments thereto. *Held*, to apply, where the girl is under the age of consent.

2. ILLEGAL MARRIAGE — EVIDENCE.—Where a justice joined in marriage a girl who was under the age of consent, it was held competent to show that his family and her father's were acquainted, and that at the marriage he did not inquire for her parents, who were not present; these facts tended to show that he knew the marriage was unlawful.

3. SUPPRESSION OF TESTIMONY BY PROSECUTION.—The rule, requiring the prosecution to call every attainable witness where testimony is needed to disclose any part of the transaction, is to prevent the suppression of evidence, and does not make it necessary to call all the witnesses particularly when their evidence would be only cumulative.

4. PROOF OF GUILTY KNOWLEDGE.—When guilty knowledge is an ingredient of the offense, there need not usually be direct proof of actual, positive knowledge, but the jury may infer it from suspicious circumstances, such as apparently intentional neglect to make inquiry before taking part in a transaction.

COOLEY, C. J., delivered the opinion of the court:

The defendant has been convicted on an information which charges that "heretofore, to wit, on the 28th day of February, A. D. 1876, at the Township of Huron, in said County of Wayne, one William Bonker, late of said township, being then and there a justice of the peace of said township, and in and for said county, unlawfully did undertake to join in marriage Frank Bogart and Ann Eliza Davis, she, the said Ann Eliza Davis, being then and there a female under the age of sixteen years, to wit, of the age of thirteen years, and not capable in law of contracting marriage, and the age of the said Ann Eliza Davis being then and there a legal impediment to the said proposed marriage, he, the said William Bonker, then and there, and at the time he undertook to join the said Frank Bogart and the said Ann Eliza Davis in marriage, well knowing that the said Ann Eliza Davis was then and there a female under the age of sixteen years, contrary to the form of the statute," etc.

On the trial, the main facts appear to have been undisputed. The girl was the daughter of one Daniel T. Davis, who lives in the same township with defendant, and the two had known each other for three or four years, and had had some business dealings of no great importance. A part of that time they resided within a mile of each other, and the girls of the two families seem to have been acquainted. The girl testified that she had known defendant about four years, and the record does not show that this fact was disputed by him. At the time of her marriage she was in the employ of one Hemstock, about forty rods from and in sight of her father's house. An arrangement was fixed up between Mr. and Mrs. Hemstock and Bogart for the marriage of the latter to this girl, and, the defendant coming along the road with one Newland, Bogart went out and called him to marry them. When he came in, he asked the girl how old she was, and she replied, sixteen. Her testimony was, that she made this statement under the instructions of Hem-

stock and Bogart; but they denied this. She was in fact but thirteen years of age. Without taking any precaution beyond this simple inquiry, and without the presence or knowledge of any of the girl's family, the defendant proceeded with the marriage ceremony. These facts, it must be conceded, make out a very gross case of abuse of official authority, and it remains to see whether any of the exceptions taken to the conviction can be supported.

1. It is claimed that the information makes out no case under the statute. The information was filed under section 4729 of the Compiled Laws, which provide that, "if any person shall undertake to join others in marriage, knowing that he is not lawfully authorized to do so, or knowing of any legal impediment to the proposed marriage, he shall be deemed guilty," etc. The argument on the part of the defendant is, that an "impediment" is that only which absolutely precludes a marriage being formed,—such as relationship within the prohibited degrees, or a previous marriage not dissolved,—and that, as the marriage of a party under the age of consent would not be void, but only voidable, the want of age could not constitute an impediment. This argument would apply equally well to a marriage accomplished by force or fraud,—such marriages being voidable only,—and would protect the magistrate, though the facts were all known to him. We doubt the validity of the argument, and should be inclined to hold that whatever is in the way of a valid marriage must be understood to constitute such an impediment as the statute has in view. The statute authorizes certain marriages, and does not authorize others; it points out what shall prevent or impede them. But it is not necessary to rest the case on this view; for, where the statute does not authorize a certain marriage, a magistrate can not be "authorized" to join the persons in marriage. The age of consent in a female is by the statute fixed at sixteen years; and though the law, in view of the serious consequences that might follow from treating all marriages as void where one of the parties is under the age of consent, holds them to be voidable only, it nevertheless does not authorize them. Like a fraudulent marriage, they are unauthorized; for consent is the first requisite in marriage, and in these cases the capacity to consent is withheld by law.

2. Exception was taken to the admission of evidence to show that the families of defendant and Davis were acquainted, and that at the time of the ceremony defendant made no inquiry for the girl's parents. This evidence bore strongly on the probability of defendant's knowledge that his act was unwarranted, and, we have no doubt, was properly received. It tended to show that he must have had some knowledge of the girl's age; and it put before the jury, the extremely suspicious circumstance that in the immediate vicinity of her father's house he was willing, without the presence, and so far as he knew, the knowledge of her parents, to join in marriage a girl who, even if she were sixteen, would be unfit to act in so important a matter upon her own judgment.

3. The third exception was to the refusal of the court to require the prosecution to put upon the stand as witnesses for the people Mr. and Mrs. Hemstock, Bogart and Newland. There was nothing in the case to indicate that Newland could have given material evidence; it only appeared that he was in the road with defendant when the latter was called in; and that was not part of the *res gestæ*. The record discloses no fact that renders it at all material, that defendant was called in by one person rather than by another, or what was said in calling him in, or how he came to be present. The *res gestæ* begin with his presence in the house. Evidence as to how or why he came to be there was proper as introductory or explanatory; but nothing depended on it. The claim that the others should have been called by the prosecution is made in reliance upon Maker v. People, 10 Mich. 212, and Hurd v. People, 25 Mich. 405. One of those cases was an information for murder; and the other for assault with intent to commit murder and the principle deducible from them is, that "the prosecutor, in a criminal case, is not at liberty, like a plaintiff in a civil case, to select out a part of an entire transaction which makes against the defendant, and then to put the defendant to the proof of the other part, so long as it appears at all probable from the evidence that there may be any other part of the transaction undisclosed, especially if it appears to the court that the evidence of the other portion is attainable." "If the facts, stated by [the witnesses] who are called, show *prima facie* or even probable reason for believing that there are other parts of the transaction to which they have not testified and which are likely to be known by other witnesses present at the transaction, then such other witnesses should be called by the prosecution, if attainable." 25 Mich. 416, 417. These cases are really aimed at a suppression of evidence by management, and they do not decide, as is claimed, that all the witnesses to a transaction must necessarily be called by the prosecution; the justice of requiring this must depend upon circumstances, and it would seldom be as manifest in cases of mere misdemeanor as in cases of higher offenses, especially those accomplished by violence. But in this case there was no reason to suppose that the prosecution had failed to put all parts of the transaction before the jury by its evidence; and the testimony of other by-standers could only have been cumulative. Moreover, the connection of the Hemstock's and Bogart with the affair was such as fairly to excuse their being called. They must have known a great wrong was being perpetrated, and they were assisting, and one of them a principal in it. Had it been a crime of violence, their connection with it was such as would have justified the State in making them parties defendant; and though this statute does not provide for punishing them, we can not say that the court erred in not requiring the prosecution to give credit to their testimony by calling them. They were present in court, and the defendant had the benefit of their testimony afterwards: and if the court had any discretion in the premises, as we think it had, the discretion was not abused.

4. A further question arises upon the instructions to the jury. One of these was that, "if you think, from the appearance of the girl, from the testimony in the case, that the defendant, although he could not have known positively what her age was, but if he had good reason to believe from all these facts that she was under the age of sixteen, then your verdict must be guilty." And again, that if, in the exercise of a reasonable discretion, he had reason to believe she was not sixteen, then he must be deemed to have united them in marriage, knowing there was a legal impediment. These charges are objected to as in effect making negligence the equivalent of guilty knowledge.

No doubt, where guilty knowledge is an ingredient in the offense, the knowledge must be found; but actual, positive knowledge is not usually required. In many cases, to require this must be to nullify the penal law. The case of knowingly passing counterfeit money is an illustration; very often the guilty party has no actual knowledge of the spurious character of the paper, but he is put upon his guard by circumstances, which, with felonious intent, he disregards. Another illustration is the case of receiving stolen goods, knowing them to be stolen; the guilt is made out by circumstances which fall short of bringing home to the defendant actual knowledge. He buys,

perhaps, of a notorious thief, under circumstances of secrecy and at a nominal price; and the jury rightfully hold that these circumstances apprise him that a felony must have been committed. Andrews v. People, 60 Ill. 354; Schriedley v. State, 23 Ohio (N. S.), 130. If, by the statute now under construction, actual, personal knowledge is required, the statute may as well be repealed; for it can seldom be established, even in the grossest cases. How many justices are likely to know the exact age of all the girls in their township approaching the age of consent?—or even of all those in their immediate neighborhood, except as they rely upon reputation or family report? Or, in how many cases can they testify, of their own knowledge, that a young man and young woman, living as inmates of the same family and recognized as brother and sister, do in fact bear that relation to each other? Or, that one who comes to be married has not a wife living, from whom he is not divorced? Indeed, in the great majority of cases one must obtain his knowledge from common report, from the statements of third parties; from any sources, in fact, upon which individuals would rely in investigating for their own protection into such facts; and he would justly be deemed inexcusable, if he should persistently shut his eyes to such facts as were apparent to everybody else.

We think there is no doubt that in this case the jury would have been warranted in finding, on the facts which appear, that the defendant had knowledge of the impediment, had the instructions been such as the defendant insisted they should be. One fact, not hitherto stated, would have been regarded as very significant; namely, that the defendant, though required by statute to examine one of the parties on oath, neglected to do so. Comp. L. § 4726. This, in view of the extreme youth of the girl, was a very significant fact, and looks like a careful avoidance of the proper means of information. Had he taken the proper evidence under oath and been deceived, perhaps he would have been justified, even though he had had reason to believe the age of consent had not been reached; but where he neglects the testimony which he is required to take, and pretends to rely upon the less satisfactory oral statement which he is not required to take, the neglect may well be imputed to illegal intent.

But the question whether on the evidence the jury ought to have found that the defendant had guilty knowledge, is not the same as the question presented here. We are not agreed that the charge of the circuit judge can be supported, though some of our number are inclined to think it may be. The better course unquestionably would have been for the circuit judge to have submitted all the facts to the jury, and to have allowed them to draw their own conclusion regarding the knowledge of the defendant that he was proceeding unlawfully. It is to be presumed that the jury would have dealt intelligently with the facts, and not permitted a reckless official to have set at naught with impunty the provisions of a statute which has for its object the prevention of unfit, immoral and scandalous marriages.

The circuit court will be advised to grant a new trial.

RAILWAY AID BONDS—EFFECT OF RAILWAY CONSOLIDATION.

SCOTLAND COUNTY v. THOMAS.*

Supreme Court of the United States, October Term, 1876.

1. THE PROVISIONS OF THE MISSOURI CONSTITUTION AS TO CONSENT OF VOTERS TO ISSUE OF BONDS NOT RETROACTIVE.—Section 14 of article 11 of the Constitution of Missouri, which provides that "the General Assembly shall not authorize any county, city or town to become a stockholder in, or to loan its credit to any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto," does not take away authority already granted, but simply limits the power of the legislature in the future.

2. CHARTER POWER TO RECEIVE SUBSCRIPTIONS—EFFECT OF CONSOLIDATION WITH ANOTHER RAILROAD.—The charter of Alexandria and Bloomfield Railroad Company empowered the county courts of the counties through which the road ran to subscribe to its stock and issue bonds in payment of the same without a vote of the people. Subsequently its name was changed, and it was consolidated with an Iowa company whose road intersected it: *Held*, that the power given to the counties to subscribe, was a right and privilege of the company which passed into the new condition of its existence, which the company assumed under the consolidation. Harshman v. Bates County, 92 U. S. 569, 3 Cent L. J. 367, distinguished.

3. THAT THE COMPANY with which the consolidation was effected belonged to another state does not effect the question.

IN error to the Circuit Court of the United States for the Eastern District of Missouri.

Mr. Justice BRADLEY, delivered the opinion of the court:

This action was brought by plaintiff below (the defendant in error) to recover the amount of certain interest coupons attached to ascertain bonds issued by order of the county court of Scotland County, Missouri, (the defendant below), on behalf of the county, to pay for a subscription of stock to the Missouri, Iowa and Nebraska Railway Company. The county contests the validity of the bonds on the ground that the question of subscribing to the stock was never submitted to a vote of the qualified voters of the county, as required by the constitution of the state adopted in 1865, the subscription being voted and the bonds being issued in 1870. The plaintiff answers this objection by showing that the power to make the subscription was conferred in 1857, in the charter of a company called the Alexandria and Bloomfield Railroad Company, before the constitution was adopted, and that this company by consolidation with other companies, formed the Missouri, Iowa and Nebraska Railway Company, and brought to it all its own privileges and powers,—and, amongst others, that of receiving county subscriptions to its capital stock. The county replies to this argument, that however valid it may be to sustain subscriptions made to the Alexandria and Bloomfield Railroad Company itself, had that company remained distinct as originally chartered, it cannot avail to support a subscription to the stock of a new and different company, having a much greater amount of capital stock, and a much longer and different route of railroad, running into another state. The question was raised in the court below by demurrer to the petition, and judgment was given to the plaintiff.

The clause of the constitution on which the defendant relies is the 14th section of article XI, and is as follows: "The General Assembly shall not authorize any county, city, or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto." This prohibition, it will be observed, is against the legislature's authorizing municipal subscriptions or aid to private corporations; it does not purport to take away any authority already granted. It only limits the power of the legislature in granting such authority for the time to come. This has been settled by the supreme court of Missouri in several well-considered

*For the decision of the court below in this case, see 1 Cent. L. J. 216.

decisions. See The State v. Sullivan County, 51 Mo. 522; The State v. Greene Co., 54 Mo. 540. In the former case the court say: "Power conferred on counties to take and subscribe stock without a submission to a vote of the people, before the constitution went into operation, remained unaffected by that instrument." 51 Mo. 531. The same view was taken by this court in the recent case of Callaway Co. v. Foster, 3 Cent. L. J. 814; see also State v. Maysville and Lexington R. R. Co., 13 B. Monroe, 1.

The specific question in the present case, therefore, is, whether the authority given to counties and towns in 1857 to subscribe to the capital stock of the Alexandria and Bloomfield Railroad Company has become extinguished by the subsequent consolidation of that company with other companies irrespective of the constitutional provision referred to. The constitution does not itself, as we have seen, interfere with authority given previous to its adoption.

That simple consolidation with another company does not extinguish the power of the counties to subscribe, or the company of receiving subscriptions, was decided in the case of The State v. Greene County, 54 Mo. 540. In that case the Kansas City, Galveston and Lake Superior Railroad Company was chartered in 1857, with power to construct a branch road from Kansas City to the southern boundary of the state; and power was given to the county courts of any county through which the road or any of its branches might run to subscribe to the stock of the company and issue its bonds therefor. The company afterwards changed its name, and, in 1870, consolidated with the Hannibal and St. Joseph Railroad Company; and the latter company continued the work of constructing the branch road referred to, which had been begun by the Kansas City Company. The branch was built under a separate organization created by the parent company called the Kansas City and Memphis Railroad Company, but under the control and with the aid of the parent company. The county court of Greene County, in 1870, subscribed to the capital stock of the Hannibal and St. Joseph Railroad Company, issued to aid in building and equipping the branch road, which ran through the county. The supreme court of Missouri decided that the subscription was valid; and that the power to subscribe, originally given, still subsisted unaffected by the consolidation. The cases decided by this court, of The Philadelphia and Wilmington R. R. Co. v. Maryland, 10 How. 376, and Tomlinson v. Branch, 15 Wall. 460, were cited and relied on for the purpose of showing that where a consolidation is between two railroad companies, and nothing to the contrary is indicated, the rights and privileges, as well as the duties and liabilities of each continue to exist as before in the hands of the new organization. It seems to us that this decision in the Greene County case governs the present case. It is true the court laid considerable stress on the fact that the branch road in that case was a distinct interest from that of the main line, and was not liable for its obligations or liabilities; and the holders of the stock in the branch road had the right to control its affairs, and this feature was not changed by the consolidation. This fact, undoubtedly, prevents the case from being an exact precedent for the present one. But the close and intimate relations which in other respects connected the branch with the main line in that case, give to the decision a good deal of importance. The principles adopted were substantially the same as those involved in the present case. The facts are not very fully stated in the report, but it would appear from the statement of the dissenting judge (p. 557) that the stock subscribed for in that case was the stock of the Hannibal and St. Joseph Railroad Company. As such, though it may have been special stock applicable to the branch road, it made the holder a member of the parent company entitled to vote for its directors, and, no doubt, in other ways connected with its fortunes.

In that case, as in this, the power to consolidate was given after the original charter was granted, and after the constitution went into effect. But that was not regarded as affecting the power. By general laws of the state, in force when the original charter was granted, the legislature had reserved the power to alter, suspend, and repeal all charters of incorporation, and had especially reserved this power in the general railroad act. See Revised Statutes of Mo. 1855, pp. 371, 438. It should seem clear, therefore, that alterations of the charter were admissible, and would not affect rights in the company untouched thereby, nor a power to subscribe to its stock previously existing. See Callaway Co. v. Foster, 3 Cent. L. J. 814.

The power to amend thus existing, the amending acts in this case do not subvert the original purposes of the charter, but rather carry them out and perfect them. The railroad authorized by it was "a railroad from the city of Alexandria, in the county of Clark, in the direction of Bloomfield, in the State of Iowa, to such point on the northern boundary line of the State of Missouri as shall be agreed upon by said company, and a company authorized on the part of the State of Iowa, to construct a railroad to intersect the road authorized to be constructed by the provisions of this act, at the most practicable point on said state line." Bloomfield was a small town in Iowa, evidently not intended as the final objective point of the proposed line, which is only required to be "in the direction of Bloomfield." A connection with a continuous road in Iowa was the declared object of the road proposed. It was evidently the purpose to bring Alexandria, a port of Missouri on the Mississippi river, into connection with the rich region of southern and western Iowa by means of the road then being chartered, and a road to connect therewith running into the State of Iowa. This purpose will be most effectually attained by the construction of the continuous line contemplated by the consolidated companies. The general direction of the road is not changed. It does not pass through Bloomfield, it is true; but it does not pass it by so far as to be a substantial departure from the route originally indicated. The amending act, therefore, which authorized a consolidation with the Iowa Southern Railway Company and thereby constituted the Missouri Iowa and Nebraska Railway Company, was in perfect accord with the general purpose of the original charter of the Alexandria and Bloomfield Railroad Company; and if the other rights and privileges of the latter company passed over to the consolidated company, we do not see why the privilege in question should not do so, nor why the power given to the county to subscribe to the stock should not continue in force.

The decision of this court in the case of Harshman v. Bates County, 92 U. S. 569, 3 Cent. L. J. 367, is urged against this view of the case. But we do not think it applicable. In that case the question was, whether authority given to the county court by the electors of a township to subscribe in its behalf for stock in a certain railroad company, continued to exist after the company had ceased to exist by being absorbed in another company by consolidation? We held that it did not. The county court was regarded as being the mere agent of the township, having no discretion to act beyond the precise terms of the power given. The powers of an agent or attorney, authorized to act for another, are very different from those possessed by a person acting in his own behalf. Had the charter of the Alexandria and Bloomfield Railroad Company authorized foreign corporations to subscribe to its stock

(supposing that by the general law of Missouri they had no such power), they would undoubtedly have retained that power after the consolidation; it being in their discretion to exercise it or not. But if any such foreign corporation had, before the consolidation, sent an order to a firm in St. Louis to subscribe stock for it in the original company, the firm could not have made the subscription after the consolidation without consulting their principals. Such a material change of circumstances would have rendered the subscription an excess of the power given to them. Authority given to a person, to be exercised for his own benefit and at his own discretion, may be exercised by him under changes of circumstances that would amount to a revocation of a power given to an attorney, unless it expressly conferred discretion. A recurrence to the opinion in the Harshman case will show that this distinction underlies the reasons given for the judgment in that case. The county court of Scotland county, in the present case, acted as the representative authority of the county itself, officially invested with all the discretion necessary to be exercised under the change of circumstances brought about by the consolidation in question. For, as before remarked, the county courts, in reference to the subscription, represented the counties themselves as their officially constituted authorities. This is distinctly stated by the Supreme Court of Missouri, in the case of The Hannibal and St. Jo. R. R. Co. v. Marion County, 36 Mo. 303. The power given to the county courts intersected by the Alexandria and Bloomfield railroad to subscribe to its stock, was given to them as representing the counties. When they subscribed for the stock, it was the county that subscribed. It was discretionary with them whether to subscribe or not, and (within the limits imposed by the act) how much they should subscribe.

But the case has other aspects which it is necessary to take into consideration. If we look at the subject in a broad and general view, it will be still more manifest that the power in question was intended to exist notwithstanding the consolidation. The project of the railroad promised a great public improvement, conducive to the interests of Alexandria and the counties through which it would pass. Its construction, however, would greatly depend upon the local aid and encouragement it might receive. The interests of its projectors and of the country it was to traverse were regarded as mutual. The power of the adjacent counties and towns to subscribe to its stock, as a means of securing its construction, was desired not only by the company, but by the inhabitants. Whether the policy was a wise one or not, is not now the question. It was in accordance with the public sentiment of that period. The power was sought at the hands of the legislature, and was given. It was relied on by those who subscribed their private funds to the enterprise. It was involved in the general scheme as an integral part of it, and as much contributory and necessary to its success as the prospective right to take tolls. Why it should not still attach to this portion of the road, as one of the rights and privileges belonging to it, into whose hands soever it comes by consolidation or otherwise, it is difficult to see. The principles laid down in the case of The Philadelphia, Wilmington and Baltimore R. R. Company v. Maryland, 10 How. 376, and Tomlinson v. Branch, 15 Wall. 460, and recently reaffirmed in Branch v. City of Charleston, 92 U. S. 677, seem to us directly applicable. Subscription to the stock was not only a power of the county, but a privilege of the company,—being a portion of the rights and privileges which it obtained by translation from the charter of the North Missouri Railroad Company. It was expressly so held by the Supreme Court of Missouri in the case of Smith v. County of Clark, 54 Mo. 58; and the same principle had been adopted in the earlier case of The Hannibal and St. Jo. R. R. Co. v. Marion Co., 36 Mo. 294, 304. The latter company was by its charter "entitled to all the privileges, rights and immunities which were granted to the Louisiana and Columbia Railroad Company, so far as applicable," etc. The right to receive county subscriptions was held to be one of these privileges, rights and immunities. The court said: "It was under this section that the [county] court proceeded when the stock was first taken and the notes issued. The legislature gives the company all the rights, privileges and immunities contained therein, the same as if it had been re-enacted. The language seems broad enough, by reasonable construction, to fully sustain the acts of the county court." 36 Mo. 304. In Smith v. County of Clark, the same views were held with regard to the charter now in question. The court say: "The power thus conceded to the courts or other municipal bodies may well be termed a privilege to the corporation; and we see no substantial objection to a transfer of such a privilege by simply, in general terms, embodying the section of the original act, which granted it, into the new law. That such was the intention of the legislature, and of the railroad company, is clear, and if the word 'privilege' admits of the narrow construction claimed, the practical construction it has received in this state, as may be seen by reference to the decisions of our courts, would preclude any inquiry into the subject now. These provisions were the principal means by which this and other roads were built, and without them the charters would have been of no value." 54 Mo. 67.

The power of the counties to subscribe being thus held to be a right and privilege of the company, in our opinion, passed with its other rights and privileges into the new conditions of existence which the company assumed under the consolidation.

The argument sought to be drawn from the distinction that the company with which the consolidation was effected belonged to another state, we fail to appreciate. If the legislature of Missouri authorized it, what difference can it make whether the connecting company belongs to Missouri or to Iowa? There is no difference in principle. The Philadelphia, Wilmington and Baltimore Railroad Company, in its consolidated form, combined the roads and charters of three different states; and yet it was held to be invested with the rights and privileges of each as applicable to the several parts of the line. See also, to the same purport, the case of Hanna v. The Cincinnati, Fort Wayne and Chicago R. R. Co., 20 Ind. 30.

Other points were raised on the argument which it is unnecessary to discuss, as this was the principal one relied on, and presented the only serious difficulty in the case.

The judgment of the circuit court is affirmed.

Mr. Justice FIELD did not sit in this case, and took no part in the decision.

Mr. Justice MILLER: I dissent from the judgment and opinion in this case.

UTAH DIVORCES.

HOOD v. THE STATE.

Supreme Court of Indiana, May Term, 1877.

HON. SAMUEL E. PERKINS, Chief Justice.
" HORACE P. BIDDLE,
" GEORGE V. HOWK,
" JAMES L. WORDEN,
" WILLIAM E. NIBLACK,
} Associate Justices.

1. DIVORCE GRANTED WITHOUT JURISDICTION NULL AND VOID.—A divorce granted by a court of Utah Territory,

in a suit between two persons, neither of whom was, at the time of the proceedings, a resident of Utah or within the boundaries of the territory, but both of whom were residents and citizens of a state in the Union, is void for want of jurisdiction.

2. THE CLAUSE OF THE UNITED STATES CONSTITUTION which provides that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state," does not include judgments and decrees which show upon their face that the court rendering them had no jurisdiction.

3. FORNICATION AND ADULTERY DEFINED.—Fornication is sexual intercourse between a man married or single and an unmarried woman. Adultery is sexual connection between a married woman and an unmarried man or a married man other than her own husband.

4. INDICTMENT UNDER ACT OF JUNE 10, 1852—REPEAL OF FORMER ACT REQUIRING CRIMES TO BE DEFINED IN STATUTES.—An indictment for living in open and notorious adultery or fornication will lie under the Act of June 10th, 1852, although it does not define either offense. The Act of May 31, 1852, which declares that "crimes and misdemeanors shall be defined and the punishment thereof fixed by the statutes of this state and not otherwise," must be considered as repealed by the Act of June 10th, 1853.

APPEAL from the Dearborn Circuit Court.

PERKINS, C. J., delivered the opinion of the court:

Indictment against Nelson F. Hood, for living in open and notorious fornication with one Jennie Chaney. A motion to quash the indictment was overruled. Plea not guilty—trial by jury—conviction. New trial denied, and the defendant sentenced, over a motion in arrest of judgment, to pay a fine of one hundred dollars, be imprisoned in the county jail six months, and pay the costs of the prosecution, etc. A bill of exceptions contains the evidence.

The state proved that the appellant Hood was married in Clark County, Indiana, to Maggie Hunter, in July, 1869, and that said Maggie is still living. The state proved further, that in June, 1876, the appellant Hood married Miss Jennie Chaney, of the State of Kentucky, and that soon after their marriage the two took up their residence in Aurora, Dearborn County, Indiana, where they continued to reside, living together openly and notoriously as husband and wife, till the finding of this indictment. The appellant then gave in evidence parts of the statutes of Utah on the subject of divorce. The first section of the statute confers jurisdiction upon the Probate court to grant divorces. The second section provides that: "The petition for a bill of divorce must be made in writing, upon oath or affirmation, and must state clearly and specifically the cause on account of which the plaintiff seeks relief. If the court is satisfied that the person so applying is a resident of the territory, or wishes to become one, and that the application is made in sincerity and of her own free will and choice, and for the purpose set forth in the petition, the court may decree a divorce, free the bonds of matrimony against the husband for any of the following causes, to wit:" (Here follows a specification of causes.) Section 3 is this: "The husband may in all cases obtain a divorce from his wife for like causes, and in the same manner as the wife may obtain a divorce from her husband." The statute provides further for the service of process on persons found within the territory, and for the publication of notice to those made defendants who can not be found within the territory.

The appellant then gave in evidence the record of the suit for divorce, prosecuted in Utah Territory. The commencement of the complaint of the suit is as follows:

"Nelson F. Hood v. Maggie H. Hood. In the Probate Court of Beaver County, Territory of Utah.

"The plaintiff complains and alleges that plaintiff and defendant are husband and wife; that they intermarried at Jeffersonville, State of Indiana, on the 3d day of July, 1869, and ever since have been and now are husband and wife; that plaintiff wishes to become a resident of Beaver County, Utah, but is so situated that he can not at present carry his desires into effect." The complaint proceeds to state grounds on which a divorce is prayed. It is signed: "Nelson F. Hood. A. Goodrich, plaintiff's attorney."

The complaint was sworn to in Cook County, Illinois, before "A. Goodrich, Commissioner of Deeds for Utah Territory," on the 14th day of August, 1876, and filed in the clerk's office of Beaver County, in said territory, on the 24th day of the same month, accompanied by an affidavit of the non-residence of the defendant. This affidavit was sworn to on the 14th day of August, 1876, the day on which the complaint was verified before "A. Goodrich, Commissioner of Deeds for Utah Territory,"—apparently the same person who administered the oath of appellant to the complaint. After entries of further introductory proceedings, the calling of the defendant, the entering of her default, the hearing of proof of the allegations in the complaint, the record continues thus: "On the 4th day of October, A. D. 1876, the same being one of the days of the September term of the Probate Court of Beaver County, Utah Territory, and the said plaintiff appearing by his said counsel, A. Goodrich and Daniel Tyler, and the said defendant not appearing by herself or counsel, and having been duly served with the process of this court as required by the statutes, summons having been duly served upon her by publication of the same for forty days in said territory, as required by the statute of Utah, and having been three times solemnly called to plead, answer or demur to the plaintiff's said complaint, and coming not, but making default herein, the complaint of said plaintiff was therein taken *pro confesso*. And now again on this 4th day of October, 1876, it being at the September term, A. D. 1876, of court, the said cause came on for hearing before the court. And the court having heard the testimony in said action, from which it appears that all the material allegations in plaintiff's petition are true and sustained by the testimony, free from all legal exceptions as to their competency, admissibility and sufficiency, that the plaintiff and defendant were lawfully married at Jeffersonville, State of Indiana, on the 3d day of July, 1869, and that said parties can not live in peace and union together, and that their welfare requires a separation, and that the plaintiff wishes to become a resident of the County of Beaver and Territory of Utah; that said matters and things so alleged and proved in behalf of the plaintiff are sufficient in law to entitle the plaintiff to the relief prayed for. Therefore, it is ordered and adjudged and decreed that the court, by virtue of the power and authority therein vested, and in pursuance of the statutes in such case made and provided, does order and adjudge and decree that the marriage between the said plaintiff, Nelson F. Hood, and the said defendant, Maggie H. Hood, be dissolved, and the same is hereby dissolved accordingly, and the said parties are, and each of them is, free and absolutely released from the bonds of matrimony and all the obligations thereof, and every duty, rights of dower and curtesy, claim and claims for alimony, accruing to either of said parties by reason of said marriage, shall henceforth cease and determine, and that the said parties be severally at liberty to marry again in like manner as if they had never been married.

"[Signed.] WILLIAM JAMES COX,
Probate Judge of Beaver County."

There was evidence tending to prove that appellant Hood was not within the Territory of Utah during the year the above decree of divorce was obtained, and had

not been for years previous. The indictment in this case was predicated upon section 21 of the act touching misdemeanors (2 R. St. 1876, p. 466), which reads thus: "Every person who lives in open and notorious adultery or fornication shall be fined in any sum not exceeding one thousand dollars, and imprisonment not exceeding twelve months."

The point is made that an indictment will not lie upon this section of the misdemeanor act, because it does not define the offence, or either of them, named in it. Such was formerly held to be the law in this state, but latterly the law has been held otherwise. The statute (our misdemeanor act) upon a section of which the indictment in this case is based, was approved June 10th, 1852. Another statute had been enacted on the 31st of May, 1852, which declared that "crimes and misdemeanors shall be defined and the punishment therefor fixed by the statutes of this state, and not otherwise." In Wall vs. The State, 23 Ind., 150, it is held that these statutes cannot be construed together, but fall within the rule that a later statute repeals a prior inconsistent one, and that whenever after the 31st of May, 1852, the legislature does create a crime by name, without defining it, such statute being in conflict with the act of 31st of May, repeals that act and the act creating a crime without defining it stands. This decision was followed in The State v. Craig, et al., 23 Ind., 185, and in The State v. Oskins, et al., 28 Ind., 364, and the earliest cases holding the contrary doctrine, viz: Hackney v. The State, 8 Ind., 494; Jennings v. The State, 16 Ind., 335; State v. Henry, Ib. 338; and Warren v. The State, 19 Ind., 183, are overruled in Wall v. The State, *supra*. We adhere to the late decisions, in the interest of legal stability.

The next question arising in the case is this: Is the divorce granted in Utah valid?

It is valid if the court granting it had full jurisdiction. Had it? It appears by the record that the divorce was granted in a suit between two persons, neither of whom was at the time of the proceedings a resident of Utah, or within the boundaries of the territory, or had previously been, but both of whom were residents and citizens of a state in the Union. Such being the case, neither of the parties had placed himself or herself under the jurisdiction of Utah. It is well established that the court in Utah had, and could have, no jurisdiction to grant the divorce in question, and that the same is inoperative and utterly void.

This is a question to be decided by the *jus gentium*, the law of nations, the first principles of which are, that all nations in respect to rights, are equal, and that each is sovereign within its own territory, with jurisdiction over the persons and property therein. 1 Kent Comm. p. 21. Hood, when the divorce in question was granted, was within and under the jurisdiction of a state other than Utah. It is further settled that the states of the Union as between themselves are sovereign. In determining this question of jurisdiction, therefore, we have only to inquire what jurisdiction the State of Indiana has over the people and property within the Territory of Utah; for on this point the states and territories are severally equal. What jurisdiction Illinois can exercise over residents and property in Indiana, Indiana can exercise over residents and property in Illinois. To place the matter in another light, a state may authorize divorces to be granted by legislative acts. Suppose then, that the legislature of Utah had granted this divorce, neither of the parties being citizens or inhabitants of the territory, severing a domestic relation between two citizens of and residents of Indiana, would any one claim that the divorce would be valid? If it would be, then it follows that the State of Indiana can confer upon her legislature power to divorce by statutory enactment husbands and wives citizens and residents of Utah, or Illinois or Ohio. And if so what becomes of the doctrine of sovereignty of states and nations within their own respective territories? And if the legislature of Utah cannot grant divorces to residents and citizens of foreign states, it cannot confer such powers upon the judiciary of the state. Certainly, as a general proposition, states and nations cannot exercise such extra-territorial jurisdiction. But we need not enlarge upon these established elementary principles. The case before us is too plain to admit of argument. It is shortly this: Hood desired to obtain a divorce from his wife. Neither of the parties were under the jurisdiction of Utah; the petition of Hood and the decree of divorce expressly stated this fact. If he was not a citizen and resident of Utah, he was of some other state or nation. Still the court of Utah grants a divorce to a man who informs it in his application, that he is under the jurisdiction of a state other than the Territory of Utah, and that he is not subject to hers. The divorce manifestly was granted in violation of the sovereignty and jurisdiction of another state, and in violation of the plainest principles of international and constitutional law. The provision of the statute of Utah authorizing her courts to grant divorces to citizens of foreign states and nations who were not, but desired to become residents of Utah, was *ultra vires* and void.

No plainer nor more palpable case of the exercise of extra-territorial jurisdiction could exist. Hood was not only not a citizen or resident of the territory, but he did not personally enter the territory so as to give it jurisdiction over him for temporary police purposes.

We cite on the question of jurisdiction the following cases in our own state and the cases referred to in them: Sturgis v. Fay, 16 Ind., 429; the Eaton &c. Railroad Co. v. Hunt, 20 Ind., 457; Beard v. Beard, 21 Ind., 321; Constitution of Indiana, Article 14. Nor is the decree of divorce in this case within the operation of that clause of the constitution of the United States which declares that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." Const. U. S., Art. 4, Sec. 1. That clause does not include judgments and decrees which severally show upon their face that the court rendering them had no jurisdiction in the premises. Waltz v. Bomway, 25 Ind., 380; Cooley's Const. Lim., 2 ed., page 14.

To avoid misconstruction, we wish it to be borne in mind that the record of the suit in the Territory of Utah in question in this case was not on upon an ordinary simple contract between parties who could make and rescind such contract at pleasure, but it was a suit to sever the bonds of matrimony between the parties in that suit; to dissolve a relation into which the parties could enter only in accordance with the law of the state, and which could not be dissolved by act of the parties, but only by permission of the state having at the time jurisdiction over both or one of them. As is well said by Judge Stewart, in Noel v. Ewing, 9 Ind. 37, "Marriage is more than a contract. It is not a mere matter of pecuniary consideration. It is a great public institution, giving character to our whole civil polity." It is a status, a domestic relation resulting from a consummated contract to marry. Ditson v. Ditson, 4 R. I. 87; The People v. Darnell, 25 Mich. 247. It is to a proceeding to dissolve such a relation, that what is said in this case applies. To give jurisdiction in a divorce suit the plaintiff, the petitioning party, must be a resident of the state or territory where the divorce is obtained. This fact gives jurisdiction of said person and renders the divorce (notice by publication, or otherwise, having been given to the defendant) valid as to the plaintiff; and being valid as to one, public policy demands that it should be valid as to both parties.

Falen v. Falen, 2 Blackf. 407; Jenners v. Jenners, 24 Ind. 355; Ewing v. Ewing, Ib. 468; Detson v. Detson, *supra*.

Having arrived at the conclusion that the Utah divorce was void, and that appellant is still the husband of the woman whose maiden name was Maggie Hunter, and that he is not the husband of Jennie Chaney, we proceed to inquire whether he is shown to be guilty of the offense for which he is indicted. He is indicted for fornication. Our statute does not define fornication nor adultery; but crimes, we have seen, need not be defined by statutes, and, consequently, the court must judicially declare the definition. Fornication is sexual intercourse between a man married or single and an unmarried woman. Adultery is sexual intercourse between a married woman and an unmarried man, or a married man other than her own husband.

These definitions are not in accordance with some authorities, but they are with others and, we think, the better; and they appear to us to be in harmony with the reason of things. We will limit the decision of this topic to the question of adultery, as when we show what that is we necessarily show what fornication is; as unlawful sexual intercourse that is not adultery is fornication. "By the civil law, adultery could only be committed by the unlawful intercourse of a man with a married woman. Thus, as is stated in Wood's Institutes, 272, adultery is a carnal knowledge of another man's wife, and the connection of a married man with a single woman does not make him guilty of the crime of adultery." Denny, J., in Commonwealth v. Call, 21 Pick. Bicknell in his Criminal Practice, p. 446, thus states what he understands to be the law in Indiana on this point: "Strictly adultery consists in carnal connection with another man's wife; such an act is adultery and not fornication (2 Blackf. 318), and the sexual intercourse of any man with a married woman is adultery in both, and the intercourse of a married man with an unmarried woman is fornication in both." In the State v. Wallace, 9 N. H. 575, it was held "that an unmarried man who has unlawful intercourse with a married woman, from which spurious issue may arise, is guilty of adultery." But the case in which the case has been more fully and learnedly examined than in any other which has fallen under our notice is, The State v. Lash, 1 Harrison (N. J.), 380, from which we make copious extracts:

"There never was an action for adultery known to be maintained at the common law by any but a husband, showing that the offense cannot personally be committed with any other than a *married woman*. The heinousness of it consists in exposing an innocent husband to maintain another man's children, and having them succeed to his inheritance. This is the common law doctrine of adultery, transmitted to us from the earliest times by those venerable sages who gathered it from existing precedents, records and decisions, at the times they respectively wrote. I shall cite only a few of them, because the records and decisions referred to by them have been so faithfully consulted, and the testimony of these sages examined and condensed with such precision in the imperishable commentaries of Blackstone, that it is almost vanity to look behind his work.' More definite language cannot be selected for confining adultery to illicit intercourse with a *married* woman than his following definition of the offense: 'Adultery is criminal conversation with a *man's wife*. The woman must not be single; she must be another man's wife, and whoever, married or single, had illicit intercourse with her, becomes guilty of adultery." The text is in 3 Bl. Com. 139, and is so clear of ambiguity as to challenge any attempt to evade it. Let us next see how Buller, in Book 1, Chap. 6 of his introduction, coincides with the Commentaries. He says: "The action of adultery lies for the injury done to the *husband* in alienating his wife's affections, destroying the comfort he had from her company, and *raising children for him to support and provide for*.' Buller N. P. 26. He represents adultery to be an injury to a *husband*, exposing him to have children of another man raised for him to support while he lives, and provide for at his death. This injury to a *husband* is made the very gist of adultery. No one will suppose him to mean that the alienation of the wife's affections and loss of comfort in her company, constitutes the offense. The alienation of her affections might accrue from the malignancy of her own temper, and the loss of comfort in her company from lunacy. He does not mean that any malignancy of temper, or that lunacy or any other sickness amounts to adultery. They are only aggravations that may or may not attend the offense, therefore the essence of adultery at the common law, without which the action cannot be maintained, is that criminal intercourse with a married woman which exposes her *husband* to support and provide for another man's issue. Let us next take up Bacon's Abridgement, that famous repository of the common law, wherein he draws the distinction between fornication and adultery so clearly as to admit of no equivocation. He says: 'Fornication is unlawful, because children are begotten without any care for their advention; but adultery goes further; it entails a spurious race on a party for whom he is under no obligation to provide.' Bacon on Marriage and Divorce, 569. This is the circumstance on which adultery depends at the common law—its tendency to adulterate the issue of an innocent *husband*, and to turn the inheritance away from his own blood to that of a stranger. If the woman be *single*, her incontinence produces none of these evils; her issue takes away no man's inheritance; it can do harm to nobody, and the burden of its support is cast by law upon herself and the partner of her guilt. I will barely add that adultery at the common law is limited to criminal intercourse with a *married woman*, both by Swift and Reeves, who are among our most eminent American commentators, and that I am acquainted with no practice of the common law, English or American, to the contrary. Whether its regulations on this point were borrowed in some early age from the Levitical laws which the early dispersion of the Jews carried into various parts of Europe, I am not able to say; but certain it is that this wide distinction between criminal intercourse with a *married* woman and a *single* woman is emphatically settled in the Levitical law; the former being punished with death, while the latter was only a fine. See Levit. Ch. 20, verse 10, and Deut. Ch. 22, verse 22, verse 28."

The opinion from which we have extracted was pronounced by Judge Ford. Chief Justice Hornblower added: "I have prepared an opinion, which it is unnecessary to read, according with that of Justice Ford. This question has never before been determined in this State, I believe; although the law has, ever since the year 1809, provided a punishment for the offense."

Having, in the progress of this investigation, arrived at the conclusion, as we have before stated, that the Utah divorce was a nullity, it follows that the appellant is still the husband of Maggie Hunter; that his pretended marriage with Jennie Chaney was also a nullity; that his living and cohabiting with her was the living and cohabiting of a married man with an unmarried woman, which, as we have seen, constitutes the offense of fornication—the offense for which the appellant is indicted and prosecuted in the cause now before us.

We have looked through the proceedings on the trial, and they appear to us to have been conducted with fairness and legality.

It is claimed in the brief of appellant's counsel that it was not proved the wife of appellant, whose maiden name was Maggie Hunter, was still living. The record discloses that the fact was proved. It shows that she was present in court during the trial, and was pointed out to the jury by a witness who knew her as the wife of appellant.

It is claimed that the court erred in permitting evidence of a conversation at the clerk's office in Kentucky, where Hood obtained his license to marry Miss Chaney. The evidence given touching the conversation is not in the record, and it may have been harmless.

It is urged that appellant did not intend to commit a crime. He intended to perform the act he did perform. He is charged with notice of legal consequences. We discover no error in the record.

The judgment is affirmed, with costs.

CONDEMNATION OF LAND FOR RAILROAD PURPOSES.

EVANS v. THE MISSOURI, IOWA & NEBRASKA RAILROAD.

Supreme Court of Missouri, April Term, 1877.

HON. T. A. SHERWOOD, Chief Justice.
" W. B. NAPTON, } Associate Justices.
" WARWICK HOUGH, }
" E. H. NORTON, }
" JOHN W. HENRY, }

1. CONSTITUTIONAL RIGHTS—CONDEMNATION OF LAND FOR RAILROAD USES — PAYMENT A CONDITION PRECEDENT—INJUNCTION.—Where land has been condemned for railroad purposes, commissioners appointed, damages assessed, etc., the right of the land-owner to payment for his property as a constitutional condition precedent to the transfer of the title to the land taken, exists in all its original vigor. Where the corporation is insolvent and the damages are not paid, it is the right and duty of the trial court to issue an injunction restraining the corporation from operating its cars over the land until the owner shall have been paid the assessed damages, and there is no vested right in the corporation, and no doctrine of public policy or convenience which can absolve a court of equity from this duty.

2. PRESUMPTION—EVIDENCE OF WAIVER.—Courts of equity, in such cases, will indulge in no presumption that the land-owner has waived or postponed his right to insist on payment of the damages, and will insist on, at least, as conclusive evidence of alleged waiver as is required in cases of vendor's lien, the condemnation and seizure of the land being a statutory proceeding *in invitum*.

SHERWOOD, C. J., delivered the opinion of the court:

On the hearing of this cause, the court below made an order whereby it was adjudged and decreed that defendant pay plaintiff, on or before the 11th day of January, 1875, the amount of damages assessed against him at the April Term, 1873, on account of certain condemnation proceedings instituted by defendant for a right of way over plaintiff's land. And it was, also, adjudged that defendant pay interest on the sum assessed together with costs, as well of that proceeding as of the present, and that in the event that such payment was not made at the time designated, a writ of injunction issue restraining defendant from operating its road and trains of cars thereon over plaintiff's premises until such sum be paid, etc., etc. This action of the lower court has caused this appeal by defendant.

It is assumed by counsel that plaintiff must be presumed to have waived or postponed his right to insist upon immediate payment for his land. On what a slender foundation this assumption rests will be readily seen by reference to the defendant's charter and the agreed facts of this case. That charter (Acts of 1857, p. 10, §10, and Acts of 1851, p. 483, §§ 7, 9 and 10,) gave "full power to survey, work, locate, and construct a railroad" and provides, "in order that the progress of the work may not be impeded, that after said viewers have filed their report and plat in the office as aforesaid, the company, after having made a tender of the amount of damages to the person or persons, or made a deposit of the same with the clerk of the county court in which the case may be pending, shall be authorized to proceed in the construction of the work as fully as though no disagreement had arisen.

The parties failing to agree, commissioners were, in July, 1872, at the instance of the defendant, appointed, who assessed the plaintiff's damages at $1, which sum, defendant having already located its road, deposited with the clerk and proceeded to construct its road. The plaintiff filed exceptions to the report of the viewers, and at the January term, 1873, the court set aside the report and appointed other commissioners who, at the April term, 1873, assessed plaintiff's damages at $48, and this report was confirmed and judgment rendered accordingly. Meanwhile, however, the defendant's road had been completed and in operation twenty miles west from plaintiff's land, prior to the setting aside of the report of the first commissioners, and the defendant's insolvency is admitted, an execution having been issued and returned *nulla bona*.

It is manifest that there was no *acquiesence* by the plaintiff in the condemnation proceedings, unless that be thus termed which consists only in *active resistance*. What more than he has done could be required at his hands? For it seems he could not have enjoined the company from entering on his land for the purpose of doing that for which the law gave express authority, viz: marking, surveying and locating its road. And the same remarks are equally applicable as well to the subsequent proceedings to condemn the right of way and the construction of the road. And this, because the company was only exercising its *statutory powers;* powers explicitly granted, as the act in terms shows, in order to prevent the work from being impeded. 1 Redf. on Rwys., 371, § 97; Walther v. Warner, 25 Mo., 277. And if it were doubtful as to whether equity would interpose by injunction, notwithstanding the grant to the company of legislative authority, still this doubt should certainly not work the plaintiff an injury, nor should *laches* or acquiesence be imputed to him because he did not, in addition to and in conjunction with his statutory methods of resistance, appeal also to chancery for aid, when it was at least doubtful whether any assistance from that quarter could, under the circumstances, be secured. It will not be directly claimed, though this is frequently done in an indirect and roundabout manner, that the rules of either law or native justice should change because a *corporation* happened to be plaintiff or defendant. If, in the present instance, the plaintiff had of his own head, *sold* the strips of ground in controversy, to an *individual* defendant, no one would doubt that unless waived by some affirmative or unambiguous act, that the vendor's lien still existing in all its original preference and priority, would be capable of enforcement notwithstanding the insolvency of the purchaser. Would not this doctrine *a fortiori* apply where the property is seized *in invitum*; seized by a corporation in derogation of common law and common right? If the vendor's lien has its origin in the idea that it would be unconscionable to allow the vendee to retain property *voluntarily* sold to him, and not pay its price, would not such retention be equally against good conscience where the sale is *compulsory* and the property transferred by mere operation of law? It would seem clear beyond question that the usual equity of a vendor in this regard would be so greatly strengthened

by that imperious constitutional mandate which prohibits property from being taken without a just compensation, as to require, if anything, more cogent evidence of waiver than under ordinary circumstances. For surely a constitutional right should not be lightly inferred away, nor should courts be ingenious in drawing remote or strained inferences in support of an assumed waiver where a corporation is to be benefited thereby; inferences which they would speedily scout were natural persons, under similar circumstances, invoking remedial justice.

If the law favors uniformity—if, indeed, it is no respecter of persons—there can be no difference, either in point of abstract principle, nor yet in its application, whether applied to the adjustment of rights between a natural person and a corporation, or where a like adjustment is sought between individuals alone. These remarks are induced by the position of defendant's counsel, before referred to, and by the authorities cited in support of that position. In the case of Provost v. C., R. I. & P. R. R. Co., 57 Mo. 256, 1 Cent. L. J. 509—a case which goes far beyond any other to be found in the books—it was held that ejectment could not be maintained against a railroad company, although failing to pay the owner for his land, and this upon the ground of having *waived* his right to insist on immediate payment. But, though the remedy by ejectment was denied because of the supposed waiver, it was still held that the plaintiff was entitled to equitable relief, *ex. gr.*, by having a receiver for the road appointed. That case is claimed as the counterpart of this, and so it would seem to be; and it is insisted that a waiver which should preclude a recovery in ejectment, should likewise preclude an injunction; and there would appear to be no little force in the observation, because either method of redress, if enforced, would effectually interfere with the interests of "*the public*" by preventing the operation of the road—which appears to be regarded by defendant's counsel as a very strong point. In Walker v. C., R. I. & P. R. R. Co. (same volume), it was held that mere silence and inaction for the time being, on the part of the land owner, while a railroad was being built over his property, would not be construed into acquiescence nor estop him from his action of ejectment. And in Walther v. Warner, 25 Mo. 277, cited with approval in the Provost case, it is said in conclusion, "that all the cases, in all the books, seem to assume that an individual can not be *absolutely deprived* of his property without the *actual payment* of the assessed price, even though a proper provision is made in the act authorizing the taking of it; and perhaps it would be better to hold that, even in cases where proper provision is made for the payment of the price, so that the property is allowed to pass, it passes subject to the condition that the price is subsequently paid, so that, if for any cause it be not paid, the party may repossess himself of it on account of the condition broken."

It is altogether unnecessary to say whether the facts in the Provost case were of a character to establish the inference of a waiver. It is sufficient to observe that, applying the rule before announced—the same rule which should govern between ordinary vendor and vendee—we have, after careful consideration of the facts before us, been unable to discover anything on the part of the plaintiff even remotely indicative of an intention to surrender, or so much as postpone, the right which the Constitution so sedulously protects; for he met the railroad company at the very threshold of the controversy, exhausted every means of statutory resistance, and I, for one, will never say that *this* amounts to either *laches* or *acquiescence*, or that his appeal to a court of equity for the enforcement of a plain constitutional right shall be in vain.

The case of McAuley v. Western Vermont R. R. Co., 33 Vt. 311, an action of ejectment cited in the Provost case as "strikingly in point" originated in a *written contract* between McAuley and the railroad company to take stock at its par value for his damages, and the company entered with the *consent* of the owner, and completed its road in 1851. During the progress of the work, and when near completion, the parties disagreeing *merely* as to the *quantum* of damages, proceedings were instituted by the company, damages assessed, and their amount in stock deposited with the clerk, McAuley having repeatedly refused to receive it; and there it remained at the commencement of the action of ejectment, *six years* thereafter. But there was no attempt on his part to revoke the license granted the company to enter on his land, although he discovered the alleged fraud (which consisted in the particular line of location of the road through his land) before the damages were assessed. Meanwhile, however, the decree of foreclosure obtained upon the first mortgage bonds became absolute, and the title to the road and franchises passed to the trustees under the mortgage. And this appears to have occurred prior to the bringing of the ejectment suit. The only burden of McAuley's complaint, as is clearly shown by Judge Redfield's opinion, was *not* the taking of his land; on this score he had made no objection until he brought his suit. On the contrary, "his great desire," as the learned judge remarks, "seems to have been that the damages should be agreed upon, and that he should be released from all claim under the written agreement to accept *stock*. To this extent his remonstrances were sufficiently loud and intelligible, * * * and was therefore willing that they should go forward in the construction of their road, if they would only *agree* to pay him the *money* for his land damages." All these circumstances were taken into consideration, and the plaintiff was held not entitled to maintain his action; and the obvious justness of that decision, proceeding, as it does, on the ground of license in the first instance under a written agreement, of silent acquiescence for six years after the discovery of fraud, and the acquisition of rights by innocent third parties upon the faith of that agreement, can not be questioned.

But the facts of that case bear not the faintest resemblance to this; and it is a total perversion of language to assert the remotest analogy between them. And the same may be said of Goodin vs. Cincinnati and Whitewater Canal Co., 18 Ohio St. 169; for that was a bill in equity between a portion of the stockholders of the canal company, and two railroad companies, in consequence of a fraudulent combination whereby the *canal* was despoiled and a railroad track built thereon. There was *laches* in that case also, and the complaining stockholders of the canal company might well be "presumed" to know and to acquiesce in what *their own directors* were doing.

Greenhalgh v. The M. & B. Ry Co. (3 Mylne & Cr. 784), was a proceeding for *specific performance* of a written contract between the plaintiff, who was an "*assenting party*" to a bill offered in Parliament to establish The South Union Ry Co. which, by act of Parliament was consolidated with a bill for the formation of the M. & B. Ry Co. A temporary injunction in aid of the proceeding for specific performance was granted, which, on final hearing, was divided on the grounds above stated, in connection with the fact that the plaintiff had written to the company expressing his entire willingness to let it have such portion of his land embraced in the written contract, as might be desired. Torry v. Camden & Atlantic, etc., R. R. (3 C. E. Green, 293), was merely a proceeding by the *contractors* who built a *branch road* for one company, to compel defendants to pay for the work, and to restrain the R. & D. B. R. R. Co. from using the branch road till

paid for. Injunction refused, because plaintiff's *remedies at law* were ample; and it was observed, if the road was in their possession they could maintain trespass, and if not in their possession and not let to the company, possession could be obtained by ejectment. Erie R. R. Co. v. Del. Lack & Western and M. & Essex R. R. Co. (6 C. E. Green, 283), was a contest between rival railroad companies as to which was entitled to a right of way, the *title* to which was *in dispute*. Besides, the complaining company had not only witnessed without objection the construction of the said road, but have lent their "*active assistance*" by selling for a large sum of money a portion of its own land to aid in the construction of the road complained of, and held injunctions could not be granted, and this very properly, owing to the equitable estoppel which had clearly arisen. There is, therefore, nothing in the incidents of these cases at all parallel to the case at bar, or which gives the slightest support to the position taken by defendant's counsel. And the like observation applies to Commissioners of Highways v. Dunham, 43 Ills. 56; Ross v. E. & S. R. R. Co., 1 Green, Ch. 422; Browning v. C. & W. R. R. Co., 3 Green, Ch. 47. And in Harness v. Chesapeake & Ohio Canal Co., 1 Md. Ch. 248, also cited for defendants, where an injunction *was* granted, it was held that the act of the legislature only conferred a "temporary privilege" on the company to proceed with its work, a privilege which *ceased* when the damages assessed were not paid. And it was also said: "If the owner has the right to insist upon the payment of the money before his property is wrested from him (and such right can not be disputed), what is to prevent him from invoking the aid of the court for his protection if the judgment for the money remains unpaid. The argument that the judgment is no more than a general lien does not militate against this right of the owner of the land. His title does not rest upon his rights as a judgment-creditor, but upon the act of the assembly; and upon that settled and fundamental doctrine, according to which the owner of property taken for the public use is entitled to compensation, and, as Chancellor Kent says, "to have it paid before, or at least concurrently with the seizure and appropriation of it."

The further position is taken for defendant, that although the road is completed and in operation, the owner not paid, the company bankrupt, and all the injury done to plaintiff that can possibly be done, and "after the public has acquired a right," this is a reason why equity should not interpose by granting restrictive relief. This position is taken with a very poor grace by a corporation which, under the arbitrary forms of law, has wrested property from its owner. But the complexion of this case is not at all altered by any or all of the aforementioned circumstances. That mythical personage "*the public*" so often summoned as a convenient accessory when some flagrant wrong upon constitutional right is in contemplation, can only "acquire rights" in the land even of the humblest citizens, *by payment therefor*.

The plaintiff, not being guilty of laches, not having waived or postponed his claim, *his* right to pay for his property, as a *constitutional condition* precedent, still exists in all vigor; and for the enforcement of this right equity will supply a remedy, and such a remedy as will fully meet the emergencies of the case. For, as Judge Story so eloquently observes: "The beautiful character, pervading excellence, if one may so say, of equity jurisprudence, is that it varies its adjustments and proportions so as to meet the very form and pressure of each particular case in all its complex habitudes." 1 Sto. Eq. Jur. § 439. And Lord Chancellor Cottenham repeatedly laid down the rule that it was the duty of a court of equity to "adapt its practice and course of proceeding, as far as possible to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise." 2 Redf. Law of Railways, § 9, p. 310, and cases cited.

Now, it is obvious, that were the plaintiff's lien as vendor to be enforced it could only result in a sale of that portion of the railway track passing through plaintiff's land; a something which would be of no use to a third party, and if bought in by plaintiff himself he would be in the same situation as at present, without compensation for the injury done that portion of his land occupied by the railroad track, and without pay for the damage necessarily resulting to that portion not thus included. And it is equally obvious that it would be quite as unavailing to have a receiver appointed to administer the affairs of a bankrupt corporation. But even where this not so, a court of equity, owing to the flexibility of its powers, is not confined to a *single* method of affording redress, but will, as just seen, adopt that method of administering relief, which will, without circuity of action, compel the party in default to do equity. The method best promotive of this end is that resorted to by the court below, and is abundantly sustained by the following authorities: In Stewart v. Raymond R. R. Co., 7 Smed. & Marsh. 568, where the road was already completed and in operation, but the company insolvent, an injunction was granted until the payment of damages, and if not paid in a reasonable time, the injunction to be perpetual. In that case it is very pertinently said: "The company does not pretend that the purchase-money has been paid; neither does it deny its liability to pay the damages awarded. It only insists that it is entitled to an indefinite credit, and to the intermediate enjoyment of the easement, until the money to pay can be made. We know of no principle to sustain this assumption. * * * * If the company has no right to the easement before the payment of the damages, the proposition that Stewart has a right to restrain the passage of the cars until such compensation, would seem to follow as an inevitable consequence." To the same effect are, 1 Redf. Rwys, 241, §6, and cases cited; Richards v. DeMoines, etc. R. R. Co., 18 Iowa, 259; Henry v. D. & P. R. R. Co., 10 Id. 540; Horton v. Hoyt, 11 Id. 496; High on Injunctions, § 393; Davis v. L. C. & M. R. R. Co., 12 Wis. 16; Cozens v. Bognor Rwy. 12 Jur. N. S. 738; and the doctrine asserted by most of the authorities, Nichols v. Salem, 14 Gray, 490; High on Injunctions, § 394; New Albany, etc., v. Connelly, 7 Ind. 32; Parham v. Justices etc., 9 Geo. 341; Keen v. Bristol, 26 Penn. St. 46; that where a statutory remedy is provided for obtaining damages for private property taken in the construction of roads, equity will not extend its protection until such statutory remedy be first exhausted, does not affect the *status* of the plaintiff, as he has brought himself fully within the rule by exhausting all statutory measures of redress before appealing elsewhere for aid. The doctrine above mentioned that it is wholly impossible for the land-owner, prior to the exhaustion of the remedies the statute provides, "to obstruct or in anywise impede the progress of the work," as well as the obvious corallary deducible from such a premiss, would seem in the Provost case, to have entirely escaped observation.

The foregoing reasons seem conclusive that the judgment should be affirmed, and it is so ordered.

All concur.

THE Court of Common Pleas in Dublin, on the 12th ult., decided that a Roman Catholic clergyman, in making charges from the altar against members of his own congregation, was not privileged in any way, but that, on the contrary, he was not only violating the law of England, but the law of his own church.

BOOK NOTICES.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA. By ARTHUR MACARTHUR, Associate Justice. Washington: Government Printing Office. 1877.

This is the second volume of Judge MacArthur's Reports of the Supreme Court of the District of Columbia, and embraces the cases decided from the January term of 1875 to the September term of 1876 inclusive. The volume contains 642 pages, nearly 100 cases, an index of over 40 pages, and a table of cases reported. It omits, however, a table of cases cited. If this volume is a fair specimen, the work of the government printing office will compare very unfavorably with many of the law publishing houses of this country. The printing is bad, and the paper is of several different shades.

The cases of more than local interest in this volume are the following: Farr v. Farr, p. 35, where it is held that the fact that the wife was the mother of a child, born out of wedlock prior to marriage, is not a cause of divorce, *especially* where the intended husband was informed of the circumstance before the marriage. In Pabst v. B. & O. R. R., p. 42, the plaintiff's wife was a passenger on defendant's train from Baltimore to Washington. When near the depot, in the latter city, "Washington" was called by some one. She inquired of another passenger if they were in Washington, and were answered in the affirmative. She then prepared to leave the train. The night was dark. The announcement of "Washington" was not countermanded. No warning was given to the passengers not to leave the train, and several did it. Plaintiff's wife lived near the depot, and had frequently been on defendant's road. She was seen to go out of the car door when the train started, and moved into the depot. She was afterwards found lying on the track, about two squares outside the depot, so badly injured that she died in about ten days. The judge below instructed the jury that the passenger had a right to presume that the train had stopped, and that the cry of "Washington" was made by a servant of the company, and that it was the duty of the company to contradict a false proclamation of the arrival, and to keep an agent within reach to advise passengers of the truth or falsehood of a proclamation so made, or else the company would be direlict in its duty, and be responsible for the consequences. This ruling is held to be erroneous, and a new trial granted. Walsh v. Rundelette, p. 114, decides that a parol contract for a lease, which has been partly performed by delivery of the possession of the premises and the payment of rent, will entitle either of the parties by bill in equity to compel the specific performance of the whole. In National Bank v. Smoot, p. 371, it is held that a promissory note made and signed in the city of Washington, but dated at Leavenworth, in the State of Kansas, and sent to a bank in Leavenworth and by it discounted, is to be governed as respects a question of usury by the laws of Kansas. This case also holds, that to take out interest in advance on discounting a note by a bank is not usurious, and that a contract for a loan of money at a rate of interest which is legal in the place where the contract is made, though the money is to be repaid in a state where the rate of interest is lower, is not usurious, if it be not a mere device to evade the laws of the state where the money is to be repaid. Van Riswick v. Lamon, p. 112, holds that the lien of a judgment creditor upon real estate has priority over an attorney's lien for services rendered to defendant, in a subsequent suit involving the same property. In Chandler v. Cook, p. 176, the court dismissed a bill in equity which sought to set aside a trust sale on the ground of irregularity, the advertisement of the property having stated the day of the week incorrectly, but having been corrected the day before the sale.

NOTES OF RECENT DECISIONS.

RESPONDEAT SUPERIOR—EMPLOYING COLLECTING AGENT.—*Caswell v. Cross.* Supreme Judicial Court of Massachusetts. 4 Am. L. T. R. 289. Opinion by LORD, J. One who employs a firm of collecting agents, in response to an advertising card, in which they announce that they will treat his debtors "with delicacy, so as not to offend them, or with such severity as to show that no trifling is intended," giving no special instructions, authorizes them to use such means as they see fit to adopt, in the prosecution of his business for his benefit, and is responsible therefor.

ADMIRALTY—APPEALS FROM DISTRICT TO CIRCUIT COURT.—*Drake v. Schooner Oriental.* United States Circuit Court, Northern Dist. of Ohio, 9 Ch. L. N. 321. Opinion by Mr. Justice SWAYNE. 1. The provisions of section 635 of the Revised Statutes of the United States, relative to appeals within one year from the time of entering the judgment order or decree appealed from, do not apply to appeals from decrees in admiralty. 2. Appeals in admiralty should be taken to the term of the circuit court next succeeding the term of the district court at which the decree was rendered.

MORTGAGE — POSSESSION BY MORTGAGEE WITH ASSENT OF MORTGAGOR VESTS TITLE WITHOUT OTHER CONVEYANCE.—*Cook v. Corthell.* Supreme Court of Rhode Island. 4 Am. L. T. R. 301. Opinion by DURFEE, C. J.; POTTER, J., dissenting. Although a mortgage of personal property to be subsequently acquired is in itself ineffectual to vest in the mortgagee a legal title to the property, yet if, after acquisition by the mortgagor, the mortgagee, by delivery from or by consent of the mortgagor, takes possession of the property under the mortgage conveyance, the title to the property, both in law and equity, vests in the mortgagee without further conveyance or bill of sale.

HEDGE—PARTITION FENCE—OCCUPANCY IN SEVERALTY—ADJOINING PREMISES—THROWING TO COMMON.—*Miner v. Bennett.* Supreme Court of Iowa, 11 West. Jur. 350. Opinion by DAY, C. J. Hedges, planted upon the division line between premises, do not attain the character of a partition fence, so as to impress upon the respective owners the character of occupancy in severalty, until they become sufficient to turn stock. So long as stock can pass at will, from the premises of one to those of the other, adjoining proprietors are occupying in common without a partition fence. An owner of premises occupied as above may throw any portion of the same, not less than twenty feet in width to common, upon giving six months notice to the adjoining owner.

REMOVAL OF CAUSES—DOMICIL OF CORPORATION—WHEN REMOVAL MAY BE HAD.—*Continental Ins. Co. v. Kasey.* Court of Appeals of Virginia. 4 Am. L. T. R., 291. Opinion by CHRISTIAN, J. 1. The words "final hearing or trial," in the Act of Congress of 1867, prescribing the conditions touching the removal of causes, require the application for removal to be made before "*trial*" in actions at law and before "*final hearing*" in suits in equity. Such application will not be allowed after the applicant has elected to stand a trial in the state court, if such trial is not final. 2. A foreign insurance corporation which has complied with

the laws of Virginia is domiciled there, and is not a citizen of another state in matters of controversy with citizens of Virginia. It must sue and be sued in the state courts, and does not come within the act of Congress relating to the removal of causes.

PARTNERSHIP—AGREEMENT TO INDEMNIFY RETIRING PARTNER AGAINST EXISTING CONTRACTS OF THE FIRM — PRESUMPTION AS TO KNOWLEDGE OF LIQUIDATING PARTNER WITH REGARD TO SUCH CONTRACTS.—*Farrington v. Woodward.* Supreme Court of Pennsylvania, 4 Weekly Notes, 146. Opinion by WOODWARD, J. It is the duty of a partner who has agreed to indemnify his retiring co-partner from existing contracts and obligations of the firm, to ascertain the extent and nature of a liability of the existence of which he has knowledge; and if he fail to do so, his ignorance thereof is no defense to an action for not keeping the retiring partner indemnified. An authorized agent of the firm of A. & B. procured patterns for the firm, agreeing to return them immediately after using. They were not returned. Upon a dissolution of the firm, A. agreed "to save and keep harmless" B. from all existing contracts and obligations. Suit was brought against B. for the value of the patterns. B. gave notice of the suit to A., calling upon him to defend. This A. declined to do, upon the ground that he had no knowledge of the contract to return the patterns. Judgment having been rendered against B., he brought suit against A. for damages: *Held* (reversing the judgment of the court below), that A., knowing that the *patterns did not belong to the firm*, and having them in his possession, was bound to find out all the duties and obligations of the firm concerning them. Case v. Cushman, 3 W. & S. 544, distinguished.

EVIDENCE—WHEN EVIDENCE OF COMPLAINT MADE BY PROSECUTOR IMMEDIATELY AFTER COMMISSION OF THE CRIME ADMISSIBLE—RES ADJUDICATA.—*Haynes v. Commonwealth.* Supreme Court of Appeals of Virginia, 1 Va. L. J. 358. Opinion by CHRISTIAN, J.—On a prosecution for larceny, the prosecutor gave evidence tending to show when and where the larceny was committed on him. On re-examination he was asked by the attorney for the Commonwealth, if he did not, immediately after the alleged larceny, go to the house of another person, who lived a few doors off, and tell him that he had been robbed, and the circumstances? On objection to the question by the counsel for the prisoner, the court below sustained the objection to so much of the question as referred to the details of the statement, but allowed the witness to state that he had told the other person at the time named, "that he had been robbed;" and then allowed this person to whom the statement was made to testify that the prosecutor had come to him, and told him that he had been robbed, to which the counsel for the prisoner excepted. *Held*, that the statements were inadmissible. 1. They were inadmissible as part of the *res gestæ*. "Facts which constitute the *res gestæ* must be such as are so connected with the very transaction, or fact under investigation, as to constitute a part of it;" and the above statements do not come within the definition. 2. They were inadmissible as a *complaint* made by the prosecutor, recently after the outrage was committed. The only exception to the general rule, excluding the statements or declarations of parties, as hearsay evidence as a *complaint* is that in cases of *rape* and in this case the *complaint* must be made *at once*. 3. They were inadmissible for the purpose of rebutting the imputation that the prosecutor was drunk at the time the statements were made. If the credibility of a witness is assailed because he was drunk, the only way to meet the assault is, by proving by others his *actual* condition at the time of the transaction of which he speaks, and not by statements and declarations of his own to others, which might prejudice the prisoner while given in evidence under the pretence of showing that they were such as a sober man would make under the presumed circumstances of the case.

HOMESTEAD EXEMPTIONS.—*Barber v. Roraback.* Supreme Court of Michigan, 15 A. L. J. 497. Opinion by COOLEY, C. J. The Constitution of Michigan provides for a homestead exemption of forty acres, if outside a town; or, if inside, a lot worth not more than $1,500. *Held*, that a subsisting right to the forty-acre exemption is not changed by the extension of the municipal limits to include the land. In Wisconsin it has been decided that, under circumstances like those here stated, the debtor is entitled only to a town homestead. Bull v. Conroe, 13 Wis. 233. See Parker v. King, 16 *Id.* 228. But in the same state it is held that homestead laws must be liberally construed. Weisbrod v. Daenicke, 36 *Id.* 73; Jarvais v. Moe, 38 *Id.* 440, and cases cited. This is a very proper rule of construction when the benevolent purpose of the statute is had in view, and it has been adopted by other courts. Deere v. Chapman, 25 Ill. 610; Webster v. Orne, 45 Vt. 40-42; and see Beecher v. Baldy, 7 Mich. 488. In Iowa the conclusion is that an extension of town limits, so as to bring in a county homestead, can not deprive the debtor of his right to the full exemption as it existed before. Finley v. Dietrick, 12 Ia. 516. In Texas the same ruling has been made. Nolan v. Reed, 38 Tex. 425; Clark v. Nolan, *Id.* 416. The right once acquired seems to be regarded in that state as a vested right. Bassett v. Messner, 30 Tex. 604. And while it is not strictly that, it is certainly a valuable right which has been secured to the debtor for substantial reasons of public policy, as well as of individual and family benefit; and an intention to modify it to the prejudice of the debtor, by a statute having other purposes for its object, is not lightly to be inferred. All implications must be against such an intention. Especially should this be so, when the constitutional limitation of a homestead is restricted within limits so very moderate as those which are prescribed in this state.

CRIMINAL LAW—ILLEGAL OPERATION WITH INTENT TO PROCURE A MISCARRIAGE — EVIDENCE — INDICTMENT.—*Commonwealth v. Brown.* Supreme Judicial Court of Massachusetts. 4 Am. L. T. R. 292. Opinion by MORTON, J. 1. Upon the trial of an indictment for an illegal operation upon a woman, with intent to procure a miscarriage, an officer was permitted to testify that he took the defendant, after his arrest, into the presence of the woman, and asked her if the defendant performed an operation upon her; that the woman said he did; that the defendant asked the woman if she had been operated on previously by any other person; that the woman said, "No, she came there to be operated on to get rid of a child." *Held*, that the evidence was admissible. 2. Upon the trial of an indictment for an illegal operation upon a woman, with intent to procure a miscarriage, certain surgical instruments and a speculum chair, found in the defendant's house, were exhibited to the jury. There was evidence that the chair had been used in performing the operation, and medical experts were allowed to testify that the surgical instruments were adapted to producing abortions, although none of them could be said to be so exactly designed for such use as not to be appropriate also for use in lawful acts of surgery. *Held*, the defendant had no ground of exception to the admission of this evidence. 3. Medical books can not be read in evidence to the jury. 4. Upon the trial of an indictment for an illegal operation, with intent to

procure a miscarriage of a woman who had applied to the defendant for that purpose, the woman testified as a witness, and the defendant requested an instruction that, though she were not to be considered as an accomplice, the jury were to take her statements "with great circumspection and caution and discredit." This was refused; but the judge instructed the jury that the fact that the witness was implicated in the alleged acts of the defendant might be considered as affecting her credibility and the weight of her testimony. *Held*, that the defendant had no ground of exception. 5. An indictment under the Gen. Stats., ch. 165, sec. 9, alleged that A. B., at a time and place named, "with force and arms, did unlawfully use a certain instrument, a more particular description of which is to said jurors unknown, by then and there forcing and thrusting said instrument into the body and womb of one C. D., being then and there pregnant with child, with the intent of him, said A. B., thereby then and there to produce the miscarriage of the said C. D.," and concluded in the usual form. *Held*, that the indictment was sufficient. An indictment may contain two or more counts alleging distinct offenses, if they are of the same general description, and the mode of trial and the nature of the punishment are the same.

NOTES OF RECENT ENGLISH DECISIONS.

WILL—GIFT OF RESIDUE—WORDS "MY DESIRE BEING THAT THEY SHALL DISTRIBUTE SUCH RESIDUE AS THEY THINK WILL BE MOST AGREEABLE TO MY WISHES"—BENEFICIAL INTEREST.—*Stead v. Mellor.* High Court, Chy. Div., 25 W. R. 508.—A testatrix gave the residue of her real and personal estate in trust for such of her nieces, P. and T., as should be living at her death, "her desire being that they should distribute such residue as they might think would be most agreeable to her wishes." *Held*, that these words did not create a trust. Briggs v. Penny, 3 Mac. & Gor., 546, commented on.

MASTER AND SERVANT—INJURY FROM SERVANT'S NEGLIGENCE—COURSE OF EMPLOYMENT.—*Rayner v. Mitchell.* High Court, C. P. Div., 25 W. R. 633.—It was the course of employment of a carman of the defendant, who was a brewer, with the defendant's horse and cart to deliver beer to the customers, and on his return collect empty casks, for each of which he received a penny. The carman, having, without the defendant's permission, taken out the horse and cart for a purpose entirely his own, on his way back collected some empty casks, and while thus returning the plaintiff's cab was was injured by the carman's negligent driving. The carman was paid by the defendant as usual for each of the casks collected. *Held*, that the defendant was not liable.

CARRIER—LOSS OF GOODS—CONSIGNMENT-NOTE—PROTECTION FROM LIABILITY—WILFUL MISCONDUCT—PROPERTY IN GOODS—PROPER PERSON TO SUE.—*Hoare v. Great Western S. S.* High Court, C. P. Div., 25 W. R. 631.—Plaintiff, the owner of goods in bulk, sold a portion of them to F. The goods were ascertained and forwarded by the defendants' line, but addressed in error to "the order of Jeeves." Jeeves refused to take the goods. Jarvis applied to the defendant for goods similar in quantity and kind to the plaintiff's goods and consigned by a person of a like surname. The defendants without inquiry delivered the goods to Jarvis. The consignment-note signed by plaintiff's agent relieved the defendants from liability "except upon proof that such loss, detention, or injury arose from wilful misconduct." In an action for the price of the goods, *Held*, (1) That the property in the goods had not passed from the plaintiff, and, therefore, he was the proper person to bring the action; (2) that the condition in the consignment-note extended to the defendants as involuntary bailees, under the circumstances; and (3) that the delivery of the goods to Jarvis amounted to "wilful misconduct."

WILL—IMPLIED REVOCATION—LATER WILL WITHOUT REVOCATORY CLAUSE—UNDISPOSED-OF RESIDUE.—*Dempsey v. Lawson.* High Court, Probate Div., 25 W. R. 629.—If it can be collected from the language of a testator that he intended to dispose of his property in a different manner to that in which he disposed of it in a former will, the earlier document will be revoked, although in some particulars the later one may not cover the whole subject-matter. Plenty v. West, 1 Rob. Ecc. 264, followed. Lemage v. Goodban, L. R. 1 P. & D., 57, 14 W. R. Prob. Div. 21, distinguished. The testatrix made two wills. The earlier instrument contained directions as to the distribution of the residuary estate. In the later instrument there was no such provision and no express revocation of the earlier will, and the dispositions of the property were essentially different. There were certain assets in the possession of the testatrix at the time of her death as to the disposition of which the later will was inoperative. *Held*, that, notwithstanding the absence of an express revocatory clause in the later will, the earlier will was entirely revoked; and that the residuary bequest in the earlier will had no effect on the property not disposed of by the second will, as to which property there was an intestacy.

COMPANY—QUALIFICATION OF DIRECTOR—ACCEPTANCE BY DIRECTOR OF PAID-UP QUALIFICATION SHARES GIVEN HIM BY PROMOTER—MISFEASANCE.—*Re Caerphilly Colliery Company.* Court of Appeal, 25 W. R., 618.—The articles of association of a colliery company fixed twenty-five shares as the qualification of a director, and authorized the directors to carry out and complete a provisional agreement for the purchase of a colliery on behalf of the company, which agreement was "thereby adopted and confirmed by the company." The vendor in the agreement was an agent for H. and two other persons who were the promoters of the company and the real vendors. Fourteen hundred paid-up shares were to be taken as part of the purchase-money. P., one of the first directors, had assisted H. in the formation of the company, knowing him to be a promoter, but not knowing him to be a vendor. At a meeting of directors it was resolved, on the motion of P., that share warrants for 1,400 paid-up shares should be allotted to H. as a trustee for the nominal vendor, and H. then handed to P. warrants for twenty-five paid-up shares. P. had not stipulated to have his qualification found him, but alleged that he had accepted them as part payment for the services rendered by him to H. The company failed, and on an application by the liquidator in the winding-up, under section 165 of the Companies Act, 1862,—*Held* (affirming the decision of Bacon, V. C.), that P. had obtained the shares under circumstances which made him liable to account (at the option of the company) either for their value at the time he received them, or, if they had increased in value, for the shares themselves or their proceeds. 2. The company having elected to charge P. for the value at the time the shares were received, and it appearing from the evidence that at that time P. had treated them as worth their full nominal value, and that other shares were being issued to the public at par,—*Held*, that the Vice-Chancellor was right in fixing the amount to be paid at the full nominal value of the shares.

CONSTRUCTION—MORTGAGE BONDS—TRUST DEED—BONDS "OUTSTANDING AND BEARING INTEREST"—DEFAULT BY MORTGAGORS IN PAYMENT OF PRINCIPAL ON DRAWN BONDS—INTEREST ACCRUING AFTER BONDS DRAWN FOR PAYMENT—PRIORITY OF DRAWN AND UNDRAWN BONDS.—*Gardillo v. Weguelin.* Court of Appeal, 25 W. R. 623.—By the terms of a trust deed for securing the repayment by semi-annual drawings for ten years on November 1 and May 1 in each year of a public loan which was raised for the completion of a railway in Peru, and issued in mortgage bonds payable to bearer, with half-yearly coupons for interest at seven per cent. attached, the concessionaires of the railway assigned the railway and all its appurtenances to trustees, and covenanted with them to remit to London monthly sums sufficient to meet the half-yearly service of the interest and redemption of the loan, such funds to be applied (after payment of the first half-yearly interest) in payment on the next following December 1 or June 1 (as the case might be) of the principal sums secured by such of the said bonds as should have been "drawn for redemption" on the preceding November 1 or May 1, and of the half-yearly interest on such of said bonds as should be "outstanding and bearing interest." But no interest was to be payable "on any drawn bond after the day fixed for its redemption." In case of default by the mortgagors, the trustees were empowered to take possession of the railway and receive the profits. All moneys so received were to be applied, first, in payment of all arrears of interest actually due on such of the said bonds as should be "outstanding and bearing interest"; secondly, in redemption of such an amount of the said bonds as ought to have been redeemed but had not been redeemed owing to the default of the mortgagors; and, lastly, in payment of future interest on the bonds, and in redemption of them in future half-years. Default was made by the mortgagors, and an action was commenced against the trustees by holders of bonds which had been drawn for payment, but were unpaid owing to the default of the mortgagors, asking (amongst other things) for a declaration that interest at seven per cent. was payable upon all the bonds, whether drawn or undrawn, until payment of the principal, and that the interest and arrears of interest on the plaintiffs' bonds were payable in priority to, or at all events ratably with, the interest on the undrawn bonds. *Held* (reversing on this point the decision of Jessel, M. R.), that interest was payable on plaintiffs' bonds from the time they were drawn until payment. *Held*, also, by James, L.J. and Amphlett, J.A. (Brett, J.A., diss.), that the plaintiffs' bonds were "outstanding and bearing interest" within the meaning of the trust deed; and, therefore, that the plaintiffs were entitled to be paid interest at seven per cent. until the payment of the principal, ratably and *pari passu* with the holders of undrawn bonds. *Held*, by Brett, J.A., that the plaintiffs' bonds were not "outstanding and bearing interest," and therefore that the plaintiffs were only entitled to such sum for principal, interest, and costs from the time their bonds were drawn as they would have been entitled to if they had been plaintiffs in a mortgagee's suit for foreclosure; and that the payment of such sum was postponed by the deed until after payment of arrears of interest on undrawn bonds.

AN EXPERT writes to the Chicago Legal News warning the profession against the use of colored inks, especially violet, in the preparation of papers which are intended for preservation. The old-fashioned black inks are, he says, the only safe inks in use. These undergo changes in time recognizable with the microscope; but under ordinary circumstances, as is well known, writing executed with these inks remains legible for centuries.

UNITED STATES SUPREME COURT DECISIONS.

October Term, 1876.

PRACTICE—ORDER OF SEVERANCE IN COURT BELOW—PARTIES TO APPEAL—REVERSAL OF DECREE BECAUSE TOO LARGE.—*Terry v. Merchants and Planters' Bank.* Appeal from the Circuit Court of the United States for the Southern District of Georgia. Opinion by Mr. Justice MILLER. 1. Where an appellant obtains an order of severance in the court below, and does not make parties to his appeal some who where parties below, and who are interested in maintaining the decree, he can not ask its reversal here on any matter which will injuriously affect their interests. 2. When an appellant seeks to reverse a decree because too large an allowance was made to appellees out of a fund in which he and they were both interested, he will not be permitted to do so when he has received allowances of the same kind, and has otherwise waived his right to make the specific objection which he raises for the first time here.

AT WHAT STAGE MOTION TO DISMISS WILL BE HEARD IN SUPREME COURT. —*Clark v. Hancock et al.* In error to the Supreme Court of the State of California. Opinion by Mr. Chief Justice WAITE.—The final judgment in this case was rendered October 3, 1876, and the writ of error issued November 16, returnable to the October term, 1877. The defendants in error, having filed a copy of the record and docketed the cause, now move to dismiss for want of jurisdiction. It was insisted that a motion to dismiss can not be entertained until the return day of the writ. "Such was the old practice; but in *Ex parte* Russell, 13 Wall. 671, and Thomas v. Woolridge, 23 Wall. 288, the rule was changed. It seemed to us then that such a change would be likely to prevent great delays and expense and further the ends of justice. Subsequent experience confirms that opinion. In the present crowded state of our docket it becomes us to be especially careful that our jurisdiction is not invoked for delay merely, and when the record is presented in such a form that we can without too great inconvenience inform ourselves of the questions to be decided, we shall be inclined to receive applications of this kind. In the present case we have a printed record, and it is evident we have no jurisdiction. The motion to dismiss is, therefore, granted."

CONSTRUCTION OF THE ACT OF CONGRESS DECLARING THAT EIGHT HOURS SHALL CONSTITUTE A DAY'S WORK FOR GOVERNMENT EMPLOYEES.—*United States v. Martin.* Appeal from the Court of Claims. Opinion by Mr. Justice HUNT. 1. The act of Congress declaring "that eight hours shall constitute a day's work for all laborers or workmen * * employed by or on behalf of the government of the United States," is in the nature of a direction by the United States to its agents. It is not a contract with laborers to that effect, and does not prevent the officers of the government from making agreements with laborers by which the day's labor may be more or less than eight hours. The act does not prescribe the amount of compensation to be paid for the labor of eight hours or of any other time. 2. Where a laborer has been in the habit of working for the government twelve hours a day at a compensation of $2.50 per day, and in answer to his request is informed that if he wishes to remain in the service he must continue to work twelve hours per day, and receives his pay accordingly, he can not afterwards recover for the additional time over eight hours as a day's labor. 3. When an application is made to the defendant for the excess of time over eight hours

per day, and an allowance is made and the receiver receipts in full for the account, there is a bar to any further claim.

ARMY REGULATIONS — MILITARY "STATION"—MILEAGE OF OFFICERS.—*United States v. Phisterer.* Appeal from the Court of Claims. Opinion by Mr. Justice HUNT.—1. An officer who is ordered home to await orders (under the consolidating act of March 3, 1869), from a post at which he is doing military duty, is entitled to mileage while traveling in pursuance of such orders. 2. Section 1110 of the army regulations of 1866, that an officer who travels not less than ten miles without troops, escort, etc., under special orders from a superior, etc., shall receive ten cents mileage, applies to such case. 3. The case is not controlled by section 1117, providing that when such officers are "permitted to exchange stations," etc., they must bear their own expenses. 4. The home of the officer to which he is ordered is not a military station. A military "station" is merely synonymous with military "post." In each case it means not an ordinary residence, having nothing military about it except that one of its occupants holds a military commission, but a place where military duty is performed or stores are kept or distributed, or something connected with war or arms is kept or done. 5. There being no exchange of stations, the case is governed by section 1110, and the officer is entitled to his mileage. 6. By section 1080 of the regulations, "when public quarters can not be furnished to officers at stations without troops, quarters will be commuted at a rate fixed by the Secretary of War, and fuel at the market prices." 7. An officer ordered home to await orders is not entitled to this commutation. His home is not a "station" within the meaning of this regulation.

RES ADJUDICATA—PATENTS—ESTOPPEL.—*Russell v. Place.* Opinion by Mr. Justice FIELD.—1. A judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties; but to this operation of the judgment it must appear, either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, the whole subject-matter of the action will be at large and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible. 2. In an action at law for damages for the infringement of a patent for an alleged new and useful improvement in the preparation of leather, which patent contained two claims, one for the use of fat liquor generally in the treatment of leather, and the other for a process of treating bark-tanned lamb or sheepskin, by means of a compound composed and applied in a particular manner, the declaration alleged, as the infringement complained of, that the defendants had made and used the invention, and caused others to make and use it, without averring whether such infringement consisted in the simple use of fat liquor in the treatment of leather or in the use of the process specified: *Held*, that the judgment recovered in the action does not estop the defendant in a suit in equity by the same plaintiff, for an injunction and an accounting for gains and profits, from contesting the validity of the patent, it not appearing by the record, and not being shown by extrinsic evidence, upon which claim the recovery was had. The validity of the patent was not necessarily involved, except with respect to the claim which was the basis of the recovery; a patent may be valid as to a single claim, and invalid as to the others. 3. If upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence.

WHEN DELIVERY OF DEED WILL BE PRESUMED—SALE OF LAND FOR TAXES—PURCHASE BY STATE—MERGER OF LIEN—EVIDENCE.—*Gould v. Day.* In error to the Circuit Court of the United States for the Eastern District of Michigan. Opinion by Mr. Justice FIELD. 1. The delivery of a deed conveying land will be presumed, in the absence of direct evidence of the fact, from the concurrent acts of the parties recognizing a transfer of the title. Thus, where a deed had been executed and recorded without the knowledge of the grantee, but subsequently upon request of the grantor, the grantee executed a conveyance to a third party, it was *held* that this recognition by both parties of the transfer of the title was sufficient evidence that at the time a delivery of the deed had been made. 2. Certain lands in the State of Michigan were sold for taxes, and for want of other purchasers were bid in by the State. Before the sale became absolute, the owner of the property, at the time the sale was made, holding the same by a perfect title, purchased the State bids: *Held*; 1st, that a redemption of the property from the sale was practically effected by the purchase; 2d, that the ownership of the State's lien and the ownership of the title to the land being thus united in the same person, the lien was merged in the title; and 3d, that tax deeds subsequently executed to the owner by the State were only evidence that the taxes were satisfied, the lien of the State discharged, and the estate restored from the sale; they transferred no new title to the grantee. 3. Where a question put to a witness is in itself unobjectionable, but the answer goes beyond what is called for, and is improper or incompetent testimony, an objection to the question will not extend to the answer. Special objection must be taken in such case to the answer. *So held*, where a witness was asked whether he could form a judgment of the quantity of timber which had been on certain pine-timber lands from the stumps that remained, and he stated in his answer what, in his judgment, the quantity was.

SUIT FOR LABOR PERFORMED AND TO ENFORCE MECHANIC'S LIEN A SUIT IN EQUITY—PROOF REQUIRED IN SUITS TO ESTABLISH LIENS—WORK DONE ON DIFFERENT PROPERTIES—NOTICE.—*Davis v. Alford.* Appeal from the Supreme Court of the Territory of Montana. Opinion by Mr. Justice FIELD.—1. A suit to recover judgment for labor performed by the plaintiff upon a quartz mill and mine in Montana Territory, and to enforce a mechanic's and laborer's lien upon the defendant's interest in the premises for the payment of the judgment, is a suit in equity, requiring specific directions for the sale of the property, such as are usually given upon the foreclosure of mortgages and sale of mortgaged premises. The fact that, according to the modes of procedure adopted in the territory, a personal judgment for the amount found due is usually rendered in such cases, with directions that, if the same be not satisfied out of other property of the debtor, the property, upon which the lien is adjudged to exist, shall be sold, and the proceeds applied to its payment, does not change the character of the suit from one of equitable cognizance, and convert it into an action at law. 2. Mechanics and laborers asserting a lien upon real property for their work, and claiming priority over mortgagees and others, who have acquired interests in the property, must furnish strict proof of all that is essential to the creation of the lien; and this

requires them to prove when the work was commenced, the character of the work, and when it was completed. 3. Work was done by the plaintiff under a contract with the defendant, made August 1st, 1869, on two distinct parcels of property situated in Montana Territory—one a quartz mill and the other a quartz mine, separated a considerable distance from each other. The work on the mill was completed in the fall of 1869 or in the summer of 1870. Nothing was done afterwards except to make occasional repairs as they were needed. The work on the mine was done in 1870, but it was not shown when the work was commenced. In June, 1871, upon an accounting between the plaintiff and the defendant, there was found due to the plaintiff a large sum, which the parties agreed should be a lien upon the mill and mine in equal proportions. Notices claiming a lien upon each for the amount as thus apportioned were accordingly filed in the recorder's office: *Held*, 1st, that a lien did not arise from this contract of apportionment or from the special contract, under which the work was done, but from the work itself which was performed upon the property; 2d. that the work being done on different parcels of property, the lien claimed on one was to be considered separately from the lien claimed on the other, 3d. that the notice, so far as the mill was concerned, was filed too late, the statute requiring the notice to be filed within sixty days after the completion of the work; and that the occasional repairs subsequently made could not be added to the work done months before, so as to render the whole work one continued performance for which a single lien could be claimed within sixty days after the last repairs; 4th. that it not appearing when the work upon the mine was commenced in 1870, it will not be presumed that it was commenced before the mortgage of the defendant was executed and recorded in September of that year, so as to give to the lien for the work priority over the mortgage.

MUNICIPAL BONDS—POWER TO ISSUE—BONA FIDE HOLDER—NOTICE.—*McClure v. Township of Oxford.* In error to the Circuit Court of the United States for the District of Kansas. Opinion by Mr. Chief Justice WAITE. 1. A municipality must have legislative authority to subscribe to the capital stock of a bridge company before its officers can bind the body-politic to the payment of bonds purporting to be issued on that account. Municipal officers can not rightfully dispense with any of the essential forms of proceeding which the legislature has prescribed for the purpose of investing them with power to act in the matter of such a subscription. If they do, the bonds they issue will be invalid in the hands of all that can not claim to be *bona fide* holders. 2. To be a *bona fide* holder, one must be himself a purchaser for value without notice, or the successor of one who was. Every man is chargeable with notice of that which the law requires him to know, and of that which, after being put upon inquiry, he might have ascertained by the exercise of reasonable diligence. Every dealer in municipal bonds, which upon their face refer to the statute under which they were issued, is bound to take notice of the statute and of all its requirements. 3. The statute under which the bonds now in question were issued, and which is referred to in the bonds, though passed and approved March 1, 1872, was not by its terms to go into effect until after its publication in the Kansas Weekly Commonwealth. Of this every purchaser of the bonds had notice, because it was part of the statute he was bound to take notice of. A purchaser would, therefore, be put upon inquiry as to the time of the publication, and by reasonable diligence could have ascertained that this did not take place until March 21. This being the case, the law charges him with knowledge that the statute did not go into effect until that date. 4. The statute further provided that no bonds could be issued under its authority until the question of their issue should be submitted to the legal voters of the town at an election, of which thirty days' notice had been given, and at which a majority of the votes should be in favor of the measure. These bonds bore date April 15, 1872, and, pursuant to the express requirements of the act, contained a statement of the purpose for which they were issued, a reference to the act under which they were issued, and the result of the vote of the inhabitants on the question of their issuance, which is stated to have been taken April 8, 1872. No valid notice of an election could be given until the act went into effect, because until then no officer of the township had authority to designate the time or place of holding it. These bonds, therefore, carried upon their face unmistakable evidence that the forms of the law under which they purported to have been issued had not been complied with, because thirty days had not elapsed between the time the law took effect and the date of the election. If a purchaser may be, as he sometimes is, protected by false recitals in municipal bonds, the municipality ought to have the benefit of those that are true. 5. This suit was brought upon coupons detached from the bonds purchased by the plaintiff in error before maturity, but upon their face they refer to the bonds, and purport to be for the semi-annual interest accruing thereon. This puts the purchaser upon inquiry for the bonds, and charges him with notice of all they contain.

RECENT DECISIONS IN OHIO.*

PROMISSORY NOTE—CHANGING RATE OF INTEREST A MATERIAL ALTERATION. *Harsh v. Klepper.* Opinion by WRIGHT, J.—1. Changing the rate of interest in a note from six to seven per cent. is a material alteration. 2. Such alteration, when made by the principal with the consent of the holder and owner, but without the consent of the surety, discharges the surety, though such alteration was made without fraudulent intent.

LIS PENDENS—BENEFIT OF RULE LOST BY NEGLIGENCE—*Fox v. Reeder.* Opinion by WRIGHT, J.—1. The benefit of the rule relating to *lis pendens* may be lost by such long-continued inaction as amounts to gross negligence in the party prosecuting, when such inaction is to the prejuice of innocent persons. 2. A mortgage was executed in 1837, upon which a bill of foreclosure was filed in 1840, decree taken and order for sale issued in 1842. Save continuances, no further action was had in the case until 1868. In the meantime, the mortgagor, who had remained in open and notorious possession, had sold a portion of the premises to innocent purchasers, without actual notice of the pending suit. Such purchasers, and those under whom they claimed, had remained in actual possession more than twenty-one years, when the plaintiff in the foreclosure suit, in 1869, caused to be issued another order of sale: *Held*, that the failure to take any action in the cause from 1842 to 1868, unexplained, was such negligence as prevented an enforcement of the decree against actual purchasers, without actual notice.

CONTRACT FOR THE SALE OF LANDS TO BE USED AS PRIZES IN LOTTERY—PUBLIC POLICY—NO RELIEF AT LAW EITHER TO ENFORCE OR RESCIND.—*Hooker v. De Palos.* Opinion by SCOTT, C. J. 1. A contract for the sale of lands which are to constitute prizes in a

*From the advance sheets of 28 Ohio State.

lottery scheme or "gift enterprise," to be set on foot by the vendee, and which are to be paid for in part by tickets in such lottery, is against public policy, and contrary to the provisions of a penal statute, and, therefore, wholly illegal. 2. The law will not aid a party to such contract, either in its enforcement whilst *executory*, or in its rescission when *executed*. 3. When such contract has been partially performed by both parties, so that the evil purpose of the contract has been in part effected by the co-operation of both parties, as where the vendor has withdrawn the land from market, and for some months subjected it to the control of the vendee for the purposes of the lottery, and the vendee has paid part of the purchase-money, and has, with the aid of the vendor, set the enterprise on foot, and issued and sold a number of lottery tickets, then, as to such part performance, the condition of the parties is the same as though the contract had been fully executed. The parties are *in pari delicto*, and the law will aid neither of them in enforcing further performance, or in undoing what has been unlawfully done. Hence, under such circumstances, the vendee can not maintain an action to recover from the vendor the money paid on the contract.

REMOVAL OF CAUSES—FOREIGN RAILROAD CORPORATION—STATUTE MAKING CERTAIN ACTS A WAIVER OF RIGHT TO REMOVE UNCONSTITUTIONAL—*Baltimore & Ohio R. R. v. Cary*. Opinion by DAY, J. 1. Under the clause of the Constitution of the United States, extending the judicial power of the United States to controversies between citizens of different states, a corporation, in respect to the jurisdiction of the Federal courts, is regarded as a citizen of the state where it was created. 2. A foreign railroad corporation, by merely leasing, possessing, and operating in this state, the property of a domestic railroad corporation, does not thereby become an Ohio corporation, nor as such a citizen of the state. 3. The proviso of the 24th section of the act for the creation and regulation of incorporated companies in Ohio, as amended March 19, 1869 (66 Ohio L. 32), so far as it provides that the leasing, purchasing, or operating a railroad in this state by a railroad company of another state shall be regarded as a waiver of the right of such foreign company to remove cases brought against it in the state courts to those of the United States, is repugnant to the Constitution and laws of the United States, and is, therefore, ineffective as a statutory waiver of the right of such removal. 4. When a corporation of another state, not being a citizen of Ohio, is sued by a citizen of the state, in the state court, it is entitled to have the case, under the 12th section of the judiciary act of Congress of 1789, removed from the state court to the United States court.

ACTION FOR CAUSING DEATH—NEXT OF KIN—SURVIVING HUSBAND—ASSESSMENT OF DAMAGES.—*Steel, Adm'r v. Kurtz*. Opinion by ASHBURN, J. In an action by the personal representative under the statute of 1851 (S. & C. 1139, 1140), to recover damages for causing by wrongful act and neglect the death of a woman, who died intestate leaving a husband, but no children or their legal representatives,—*Held*, 1. The surviving husband is, within the meaning of said act, the next of kin, and as such entitled to the fruits of any judgment obtained in the action. 2. While the proceeds of a judgment recovered in action under this statute are directed to be distributed to the beneficiaries of the judgment in the proportions provided by law in relation to the distribution of personal estates left by persons dying intestate, the money realized is not to be treated as part of the general estate of the intestate. The personal representative in whose name the action is brought is a trustee of the fund, and must distribute the proceeds of the judgment to those to whom the general personal estate would descend according to the course of the statute of descents and distribution. 3. The amount of damages (within the limit of the statute) is to be ascertained by the jury from the proofs in the case, and is to be a fair and just compensation to the widow or next of kin with reference to the *pecuniary injury* resulting to the beneficiary from such death. In such action, the jury, in assessing the damages, are limited to giving pecuniary compensation for injuries resulting to the beneficiaries in the action on account of the death of the deceased. No damages can be given on account of the bereavement, mental suffering, or as a solace on account of such death.

NOTES.

THE SOUTHERN LAW REVIEW for June—July contains the sixth and concluding paper on the Dartmouth College Causes; The Jurisdiction of Equity to Enjoin Corporate Elections, by James L. High, Esq.; Removal of Causes, by R. McP. Smith, Esq.; Jurisdiction of Probate Courts, by Hon. J. G. Woerner; The Reporters and Text Writers, by Franklin Fiske Heard, Esq.; and A Point of Chancery Practice, viz.: the extent of the discovery which a defendant may be required to make of matters of account, where the complainant's right to the account is denied, by Hon. W. F. Cooper. No less than nineteen recent legal publications are reviewed in the department of Book Reviews, and the Digest of Recent Cases is full and valuable.

NO PROFESSIONAL or official men in the world have so easy a time of it as the Irish Judges. The Lord Chancellor gets $40,000 a year, and a retiring pension, no matter how brief a time he serves, of $20,000. The Chief Justice of Ireland has $25,000 salary, and $17,000 retiring pension, after fifteen years' service. The Chief Justice of the Common Pleas, $35,000 a year, and the Chief Baron the same. Their retiring pensions are $12,500. The five puisne judges have over $17,500 a pear, and retiring pensions on the like liberal scale. All the other judges of inferior courts are liberally paid; and though the salaries are some thirty per cent. lower than similar functionaries receive in England, this is amply compensated by the difference in the cost of living. A house which would cost $3,000 a year in London can be had for $1,000 in Dublin, and wages and expenses are more than thirty per cent. less in most respects. The Irish judges have, too, at least one-third less to do than their British brethren, who are very heavily tasked, owing to the immense pressure of business in the London courts. All Irish judges get at least four months' leisure in the year. The Irish bench is almost invariably filled by men of first-rate ability, and it is rare to see its judgment reversed in the House of Lords.

THE decision of Judge Brown of the United States District Court for the Eastern District of Michigan in The Dolphin, 3 Cent. L. J. 628, holding that the underwriter of a ship has a lien for the premiums due upon marine policies, and is entitled to payment from the proceeds of sale, has been affirmed by Mr. Justice Swayne. "The profession and the courts," says the learned justice, "are very much at sea as to many questions touching liens in admiralty. Different district and circuit judges, and judges of the supreme court on the circuits are constantly deciding the same questions differently, all over the country, where such questions arise. It has been expected confidently that Congress would interpose, and by a law remedy all such doubts and difficulties. This has not yet been done, but it is hoped that it will be done at an early day. My first impulse was to take this case home with me and prepare an elaborate opinion, but reflection has brought me to a different conclusion. In such an opinion my brethern of the supreme court might not concur, and I have thought it best therefore to keep my mind, as far as it might be consistent with the performance of my duties, uninfluenced by the consideration of such cases, except as they may come before the full court. As regards this case, there are two obstacles in the way to a different conclusion than has been reached already. I should have decided the case in the same way, and as present advised, I am willing to endorse and stand by Judge Brown's opinion."